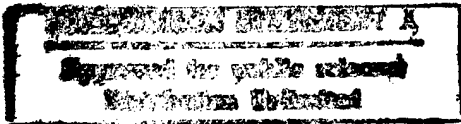
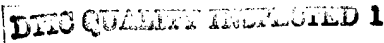


REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.				
1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE 9 September 1998		3. REPORT TYPE AND DATES COVERED
4. TITLE AND SUBTITLE STATUS OF PERSONNEL, USE OF FORCE, AND INTERNATIONAL LAW OF ARMED CONFLICT IN THE CONTEXT OF NEW UNITED NATIONS PEACEKEEPING OPERATIONS			5. FUNDING NUMBERS	
6. AUTHOR(S) JEFFREY K WALKER				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) HARVARD LAW SCHOOL			8. PERFORMING ORGANIZATION REPORT NUMBER 98-063	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) THE DEPARTMENT OF THE AIR FORCE AFIT/CIA, BLDG 125 2950 P STREET WPAFB OH 45433			10. SPONSORING/MONITORING AGENCY REPORT NUMBER	
11. SUPPLEMENTARY NOTES				
12a. DISTRIBUTION AVAILABILITY STATEMENT Unlimited distribution In Accordance With 35-205/AFIT Sup 1			12b. DISTRIBUTION CODE	
13. ABSTRACT (Maximum 200 words)  				
14. SUBJECT TERMS			15. NUMBER OF PAGES 106	
			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT	18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT	

STATUS OF PERSONNEL, USE OF FORCE,
AND INTERNATIONAL LAW OF ARMED CONFLICT
IN THE CONTEXT OF NEW
UNITED NATIONS PEACEKEEPING OPERATIONS

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SUBMITTED TO PROFESSOR ABRAM CHAYES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF LAWS AT
THE HARVARD LAW SCHOOL

CAMBRIDGE, MASSACHUSETTS
27 APRIL 1998

Chapter One: Sovereignty, Intervention, and New Peacekeeping in a Post-Cold War World

With the end of the Cold War and the resurgence of dormant ethnic and intrastate conflicts within many nations, the demands for international forces to keep the peace, ensure humanitarian relief, and secure democratic institutions in splintering states around the world have increased dramatically. The United States, hitherto hesitant to participate directly in peacekeeping missions, has significantly increased its own involvement in United Nations operations. At the same time as demands for forceful intervention have increased, events in Bosnia, Somalia, Haiti, and other troubled areas around the world have revealed shortfalls in the developed world's ability to deal the non-traditional missions of nation-building, securing humanitarian rights, and large-scale peace enforcement operations.

A fundamental question arises in the face these new operations: how well do rules developed during the era of limited "classical" peacekeeping fit these new missions? Can the old rules still apply in this new age of peace operations? Part of the problem in applying classical peacekeeping rules today is that they are a mishmash of guidelines on when to intervene (discussed in this chapter), and once decision to intervene is made, what the rules on the use of force should be. The issue of regulation of the use of force in peacekeeping and humanitarian missions is the subject of the next chapter. A third important issue, the legal status United Nations forces engaging in new types of expanded peace operations and their resulting obligations under the international law of armed conflict, is discussed in the third chapter.

The skittishness of developed nations in the face of the often open-ended nature of many new operations is nearly universal, with some notable exceptions like Canada. Many sources feed this hesitancy, but most flow from either of two fundamental issues. First, the cost in troops, money, and political capital of peace operations in far-away lands is often seen to outweigh any benefits accruing to international security or national self-interest. Second, and not unrelated, non-consensual interventions have often been decried as interference with the sovereign authority of states to deal with their own 'internal matters.'

Sovereignty and Intervention

Since at least the 17th century, the community of nations has based its relations on a generally accepted—if not always obeyed—concept of sovereign equality and domestic noninterference,¹ implicitly subscribing to a short but important set of international norms of behavior.² First and foremost, the nation-state in control of a defined territory was recognized as the basic unit of the international system. Although this may seem somewhat self-evident today, it was not so prior to Westphalia. The vicious Thirty Years' Wars that preceded the Treaty of Westphalia were more about religion than nationality—the result of the proliferation of 'just wars' sanctioned by competing religious authority.

¹ Discussion of the nature of the sovereign equality of nations began as early as 1300, but was not thoroughly articulated until 300 years later by Jean Bodin, Thomas Hobbes, and Hugo Grotius. Philpott, Daniel, "On the Cusp of Sovereignty: Lessons from the Sixteenth Century," in *Sovereignty at the Crossroads* 37, 40 (Lugo, Luis E., ed., 1996) (hereinafter *Sovereignty at the Crossroads*). It was not until 1758, however, that Emerich de Vattel, in his *The Law of Nations*, stated that the only universal rule of law among nations is that states have an equal right to non-interference in their internal affairs. *Id.*

² The discussion of the Westphalian system is based primarily on notes from a lecture on the ethics of intervention presented at Harvard Law School on 2 December 1997 by J. Bryan Hehir, S.J. Father Hehir is a lecturer at the Harvard Divinity School and advisor to the American Bishop Conference's Catholic Relief Services.

The devastation of central Europe and the revulsion at the resulting indiscriminate human suffering led to the recognition that something must replace religion for regulating the behavior of actors in the international system. Westphalia moved western states away from the single-issue polarization of the Reformation to a system wherein states could align (and realign) along other axes of self-interest. Thus the second Westphalian principle: the rejection of religion as a legitimate conflictive issue between states, or at least between *Christian* states. Finally, and of some importance here, the Westphalian system rejected any claim of right by states to interfere in the internal affairs of their neighbors, or stated inversely, there were to be no legitimate restrictions on the internal autonomy of sovereigns.³

To say these 'Westphalian principles' in the course of the last three centuries have been often violated would shock no one. However, we must be careful in distinguishing a history of breaches by nation-states, an empirical issue of fact, with an abandonment of the principles as international rules, a question of normative change. The Charter of the United Nations is shot through with concepts of sovereign autonomy within the borders of the nation-state. Article 2(1) affirms that the United Nations is "based on the principle of the sovereign equality of all its Members."⁴ Article 2(4) of the United Nations Charter asserts, "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other

³ Philpott, *supra* note 1, at 43. The Pan-American Union in 1928 took this concept of non-interference to its logical next step, agreeing in a multilateral convention at Havana to prevent any person within their territory from starting "civil strife" within the territory of another state, to disarm and intern any rebels fleeing from another state, and to stop any arms trafficking to other American states. *Convention on the Duties and Rights of States in the Event of Civil Strife*, U.S.T.S. 814 (Havana Convention of 1928).

⁴ Charter of the United Nations, art. 2, para. 1, in *Basic Documents in International Law* 37 (Brownlie, Ian, ed., 3d ed. 1984) (all future citations to the UN Charter are to this source) (hereinafter *Basic Documents*).

manner inconsistent with the Purposes of the United Nations.” Again, Article 2(7) states the United Nations will not intervene in any “matters which are essentially within the domestic jurisdiction of any state.” Even the now obscure Charter provisions on trusteeship contain a strong statement on sovereign equality.⁵

The United Nations General Assembly reiterated these principles in a 1970 resolution,⁶ stating that the United Nations has a “duty not to intervene within the domestic jurisdiction of any State” and must recognize the “equal rights and self-determination” of all members and the “sovereign equality of States.”⁷ The General Assembly envisioned a broad rule of non-interference in the “affairs of any other State” to freely choose its own political, social, cultural, and economic system as essential to peace, since any form of intervention violates the “spirit and letter of the Charter.”⁸ Similar or even more emphatic language made its way into other international instruments.⁹ Indeed, the very fact that the international community today suffers much collective anxiety regarding interventions underscores the durability of the principle of non-interference, even if often honored more in the breach than the observance.¹⁰

⁵ Trusteeships cannot be applied to Member States based on “sovereign equality.” *Id.* at art. 78.

⁶ UN General Assembly Resolution 2625 (1970), *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, in *Basic Documents in International Law*, at 37 (Brownlie, Ian, ed., 3d ed. 1984).

⁷ *Id.* at Preamble, ¶17, at 37.

⁸ *Id.* at ¶8.

⁹ See, e.g., Charter of the Organization of African Unity, art. 2, para. c, in *Basic Documents in International Law* 77 (Brownlie, Ian, ed., 3d ed. 1984). The OAU Charter states as the Organization’s purpose, “To defend their sovereignty, their territorial integrity, and independence.” In Article 3, the Organization’s principles are listed as “sovereign equality” of all members, “non-interference in the internal affairs” of states, and respect for the “sovereignty and territorial integrity” of states and the “inalienable right to independent existence.” *Id.* at art.3.

¹⁰ One commentator finds this muddled view of sovereignty has thoroughly undermined the value of the United Nations as an effective organization. “When the body of law surrounding Article 51 [of the UN Charter] is investigated, what is found is confusion, dissension, and chicanery. This is symptomatic of a UN Charter which is caught between a nineteenth-century concept of sovereignty and a mid-twentieth

The Broad Sweep of Humanitarian Interventions

Of all the emergent justifications for multilateral intervention, none has a longer pedigree nor better claim to legitimacy than humanitarian interventions—the use of force to stop or prevent abuses by other state governments of their own citizens or others, regardless of whether or not the victims are nationals of the intervening states. The early Christian church, at least as far back as the writings of Ambrose of Milan in the 4th century, allowed the use of force to protect innocent victims of violence; Augustine argued this was an obligation of all Christians.¹¹ Aquinas extended the same reasoning to self-defense in the *Summa Theologica*.¹² The Spanish scholastics Vitoria and Suarez¹³ specifically included within the duty to intervene the protection of harassed missionaries, persecuted Christians, hindered converts, threatened innocent lives, trade or innocent passage, and peoples incapable of self-government.¹⁴

Beginning with the United Nations Charter, the growth of a large body of codified international human rights law since 1945 adds substantial *gravitas* to the claim of normative status for humanitarian interventions.¹⁵ The United Nations Charter contains a provision in Article 55 that “...the United Nations shall promote... (c) universal respect

century view of humanity and universalism.” Connaughton, Richard, *Military Intervention in the 1990s* (1992).

¹¹ Augustine also introduced a concept of proportionality in warfare, stating that even in the context of a just resort to violence, the consequences of the war should not be more harmful than the evil against which it was waged. Przetacznik, Frank, *The Philosophical and Legal Concept of War* 198-99 (1994).

¹² Johnson, James Turner, in *Sovereignty at the Crossroads*, *supra* note 1, at 129-30.

¹³ Suarez also asserted that for any war to be justly waged, it had to meet four conditions: it is waged by a sovereign power, the cause is just, the method of its conduct is proper, and due proportion must be observed before, during, and after the conflict. Przetacznik, *supra* note 11, at 202-203.

¹⁴ Philpott, in *Sovereignty at the Crossroads*, at 46-53.

¹⁵ Tesón, Fernando R., “Collective Humanitarian Intervention,” 17 Mich. J. Int’l. L. 323, 330 (1996). *But see*, Franck, Thomas M., and Nigel S. Rudley, “The Law of Humanitarian Intervention by Military

for, and observance of, human rights and fundamental freedoms..” In the next article, the Charter adds, “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”¹⁶ Even lacking a Security Council determination that internal human rights abuses rise to the level of a threat to international peace and security, intervention would arguably be authorized under Articles 55 and 56.

Similarly, the Universal Declaration of Human Rights states in its preamble that “every Member State will strive... by progressive measures, national and international, to secure their [rights] universal and effective recognition and observance...”¹⁷ The Universal Declaration emphatically states that no state has the right for any reason to engage in any activity “aimed at destruction of the rights and freedoms set forth herein.”¹⁸ Again, the International Convention on the Elimination of All Forms of Racial Discrimination reiterates the inviolable nature of basic human rights and fundamental freedoms,¹⁹ and asserts—perhaps as a thinly veiled message to the Security Council—that ethnic and racial discrimination “is capable of disturbing peace and security among peoples.”²⁰ The European Convention on Human Rights, while allowing derogation of certain rights in times of national emergency, recognizes a cluster of core rights (including

Force,” 67 Am. J. Int’l. L. 277-283 (1973), wherein the authors find no convincing historical case justifying armed humanitarian intervention.

¹⁶ United Nations Charter, art. 55 and 56.

¹⁷ Universal Declaration of Human Rights, in *Basic Documents*, *supra* note 3, at 252. Nearly identical language is repeated in Article 2 of the Covenant on Economic, Social, and Cultural Rights, but not in the Covenant on Civil and Political Rights. Evans, Tony, *US Hegemony and the Project of Universal Human Rights* 148 (1996).

¹⁸ Universal Declaration of Human Rights, art. 30, *supra* note 17, at 256.

¹⁹ International Convention on the Elimination of All Forms of Racial Discrimination, in *Basic Documents*, *supra* note 3, at 304. The Convention was opened for signature by the General Assembly in 1963.

²⁰ *Id.* at 304-305.

freedom from arbitrary death, torture, slavery, and *ex post facto* laws) that cannot be infringed for any reason.²¹ In 1993, the President of the International Committee of the Red Cross, Cornelio Sommaruga, may have added force to the customary international law underpinning humanitarian intervention. Speaking in Monaco before the Academy for Peace and International Security, he asserted that humanitarian intervention may be authorized by the Common Article 1 provisions of the Geneva conventions, as well as Article 89 of Protocol I. Common Article 1 states, "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Article 89 of Protocol I pledges, "In situations of serious violations the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or independently, in co-operation with the United Nations..." Mr. Sommaruga's statement implied these provisions would authorize even unilateral intervention to stop violations not only of the provisions of the four Geneva conventions applicable during international armed conflicts, but also the universally applicable Common Article 3 protections of core human rights.²²

During the Cold War, some interventions of an arguably humanitarian nature did occur, including the 1971 Indian intervention in East Pakistan, the 1978 Tanzanian intervention in Uganda, and the 1978 Vietnamese intervention in Cambodia. In each case, however, the intervention was not sanctioned by the Security Council and the intervening state claimed their actions constituted an act of self-defense, not humanitarian intervention. Likewise, when the Security Council approved sanctions against Rhodesia

²¹ European Convention on Human Rights, art. 15, in *Basic Documents*, *supra* note 3, at 326.

²² Sommaruga, Cornelio, "Humanitarian action and peace-keeping operations," *Int'l. Rev. of the Red Cross* (May-June 1993) 241, 245.

and South Africa in the 1960s and 1970s, these were couched in terms of asserted threats to international peace and security posed by the racist regimes in those countries.²³

In 1986, a publication of the combined Nordic United Nations Stand-by Force formally adopted by all four Scandinavian ministries of defense explicitly authorized Nordic forces on United Nations duty to perform humanitarian relief operations, including assisting with utilities, reconstruction of homes and schools, sweeping mines from agricultural areas, setting up clinics and hospitals, air evacuating injured persons, distributing food, and freeing hostages or kidnapped persons. Since the Nordic states have been routine participants in United Nations force operations, the inclusion of standard procedures for humanitarian operations in a multinational force manual represented something of a formal acknowledgement that the scope of “classical” peacekeeping was broadening.²⁴

The Changing Nature of State Sovereignty

Since the end of World War II, the conception of state sovereignty has undergone something of a transformation. The international community’s collective abhorrence at the Nazi’s genocidal programs against their own citizens and the subsequent inclusion of these crimes against humanity in the indictments at Nuremberg, loosened the constrictive bonds of sovereign internal autonomy within the international system. Although non-interference in internal affairs is still a presumed starting point for interstate relations, “[t]he content and purpose of state sovereignty have undergone profound changes since

²³ Philpott, *supra* note 1, at 44. See also, my discussion, *supra* at 5.

²⁴ Hannikainen, Lauri, Raija Hanski, and Allan Rosas, *Implementing Humanitarian Law Applicable in Armed Conflicts: The Case of Finland* 107 (1992).

1945, and more dramatically since 1989. Human beings have claims against their own states and governments that the international community cannot merely ignore.”²⁵ In the short forty-year history of United Nations sponsored peacekeeping, the principle of non-interference contained in Article 2 of the United Nations Charter has been somewhat diluted by the world community’s assertion of the justness of multilateral intervention.²⁶ Forceful interventions have been undertaken to stop widespread abuses of fundamental human rights, indiscriminate violence against civilians, or suffering caused by famine—what can broadly be termed humanitarian intervention. Although the United Nations Charter contains a fair statement of 1945-era international law, its basic concept of non-interference began immediately eroding in the wake of hectic and often violent decolonization following World War II.

Simply asserting sovereign autonomy and the principle of non-interference is no longer good enough. Governments that wish to remain part of the community of nations must answer internationally for their domestic actions, particularly regarding abuse of human rights. Today, “any [United Nations] member state attempting to invoke [non-interference] now would be suspect” particularly considering that “[a] view is emerging, at least among liberal democracies, that states have the right to intervene in other states where there is a humanitarian need to do so.”²⁷ Nevertheless, the influence of the

²⁵ Tesón, “Collective Humanitarian Intervention,” *supra* note 15, at 336.

²⁶ This is a not altogether new idea. John Calvin, in his 1536 work *Institutes of the Christian Religion*, asserted that just war could be waged to “rescue victims of oppression” and to “punish crimes.” Przetacznik, *supra* note 11, at 203. Calvin’s contemporary in England, Thomas More, stated in his *Utopia* that war was justified to “liberate victims of dictatorship if done in the spirit of humanity. *Id.* at 210.

²⁷ Hensley, Gerald, “UN Peacekeeping: A Participant’s Point of View,” in *A Crisis of Expectations: UN Peacekeeping in the 1990s* 163, 167 (Thakur, Ramesh, and Carlyle A. Thayer, eds., 1995) (hereinafter *Crisis in Expectations*).

traditional concept of state sovereignty has had a surprising persistence within the United Nations. Even when imposing an embargo to combat the universally reviled system of apartheid in South Africa and Rhodesia, the Security Council shied away from explicitly stating that the embargo was imposed as a result of systematic internal human rights violations. Instead, the Security Council asserted to an incredulous world that the embargo was justified by the transnational threat of the apartheid regime, "the military build-up by South Africa and its persistent acts of aggression against neighboring states..."²⁸ Although there was some truth in this assertion in the case of South Africa, the white minority government in Rhodesia was not involved in cross-border operations. Nevertheless, through its plenary authority under Article 39, the Security Council determined that the racist regime in Rhodesia posed a threat to international peace because neighboring countries might be compelled to intervene to end white minority rule. The persistence of the concept of non-interference also had a profound impact on the early development of the normative parameters of United Nations peace operations.

Classical Peacekeeping: Limited Room for Maneuver in a Bipolar World

As a result of the Suez Crisis in 1956 and 1957, the United Nations established its first significant peace operation under a rather strained reading of Chapter VI of the Charter.²⁹ Emerging within a tightly bipolar world, peacekeeping operated in a very narrow niche as a kind of art-form that offered the superpowers an option for de-

²⁸ UNSCR 418 (4 Nov 77), quoted in Damrosch, Lori Fisler, ed., *Enforcing Restraint: Collective Intervention in Internal Conflicts* 10 (1993) (hereinafter *Enforcing Restraint*).

²⁹ The United Nations Charter explicitly envisioned a three-level structure of enforcement: a United Nations force, regional agencies, and Member States acting individually. Regional agencies and

escalating regional conflicts on the fringes of the American and Russian spheres of influence.³⁰ Peacekeeping missions were generally undertaken by light infantry forces functioning as military observers overseeing in-place cease-fires. With the exception of the ONUC mission in the Congo, all early peacekeeping forces generally fit this model, including forces in the Sinai, Kashmir, Cyprus, the Golan Heights, and south Lebanon.³¹

In the context of what has become known as “classical peacekeeping,” three fundamental normative principles have emerged. First, any operation undertaken by United Nations peacekeeping forces must be initiated with the consent of the parties to the conflict. Second, once a peacekeeping force has been deployed, they must observe strict neutrality in the use of force. Finally, the peacekeeping forces are allowed to utilize force only in self-defense. These three principles all rest to some extent upon traditional concepts of national sovereignty and noninterference.

These norms of classical peacekeeping were the synthesis of a cluster of early missions established to oversee in-place cease-fire agreements negotiated between either sovereign states (as in the case of the various Arab-Israeli peacekeeping missions in the Sinai and the Golan Heights) or between parties with closely aligned sovereign state sponsors (as in Cyprus). It is universally recognized that classical peacekeeping enjoys its greatest chance for success in this paradigmatic environment. The reason is fairly straightforward: two governments or well-established rebel groups with more or less disciplined control over their armed forces consent at the head-of-state (or equivalent)

individual states would only be allowed to act with Security Council approval. See also, Farer, Tom, *A Paradigm of Legitimate Intervention*, in *id.* at 318.

³⁰ Hayward, Antony, *Post-Cold War United Nations Peacekeeping and Its Evolution: Hostage or Soldier of Fortune?* 3-4 (1995).

level to the peacekeeping mission. In this way, peacekeeping missions from the late 1950s through the late 1980s generally operated with consent at the operational level and a reasonable assurance that consent could be uniformly enforced down to the local field commander level. Given effective consent and no organized violence against the United Nations force, legal concerns were limited to status of forces and transit agreements.³²

Until very recently, the United Nations would countenance no operation that did not have at least the tacit consent of the parties to the conflict.³³ Although this was sometimes little more than a fig-leaf,³⁴ the Security Council included statements of consent in resolutions authorizing peace operations,³⁵ partly for legal and partly for prudential reasons. Legally, absent a finding of a threat to international peace and security under Chapter VII of the Charter, the Security Council has no authority to intervene with force in a domestic conflict without consent.³⁶ Since United Nations forces are generally lightly armed with little combat support and tenuous lines of communication, prudence dictates they operate with some level of consent from the parties to the conflict. In early

³¹ Amnesty International, *Peacekeeping and Human Rights* 3 (1994). There is still a place for such missions today; the UNCRO force in the western Slavonia region of Croatia is an example.

³² James, Alan, "Peacekeeping, Peace Enforcement and National Sovereignty," in *A Crisis of Expectations: UN Peacekeeping in the 1990s* at 265-66 (Thakur, Ramesh, and Carlyle A. Thayer, eds., 1995).

³³ The first example of an authorization of clearly consent-less peacekeeping was UNSCR 688, authorizing the protection and relief of Kurds in northern Iraq. This was also the first instance in which the security Council explicitly included international humanitarian issues with international peace and security. Hayward, *supra* note 30, at 18.

³⁴ For example, during the ONUC operations in the Congo, the UN was invited to intervene by the existing Congo government, but the consent of the provisional government in the break-away Katanga province was not sought. Ratner, Steven R., *The New Peacekeeping* 103 (1995). See also, Rikye, Indarjit, *The United Nations Operation in the Congo: Peacekeeping, Peacemaking, and Peacebuilding, in Beyond Traditional Peacekeeping* 220 (Daniel, Donald C.F., and Bradd C. Hayes, eds., 1995) (hereinafter *Beyond Tradition*).

³⁵ See, e.g., Resolution Adopted by the Security Council Concerning the Situation in Cyprus (4 March 1964), in Chayes, Abram, Thomas Ehrlich, and Andreas F. Lowenfeld, *International Legal Process: Materials for an Introductory Course* 1255-57 (1968).

operations with limited objectives—with the exception of the Congo—the Security Council did not generally expect the force to endanger itself or others by forcibly coercing a particular party to a particular result.³⁷

In early peace operations, consent was seen as something of a *sine qua non*³⁸ and withdrawal of consent, particularly by a host nation, meant the United Nations force had “...neither the mandate nor the capability to remain *in situ*.”³⁹ But consent poses two difficult threshold problems: from whom does the United Nations seek consent, and what exactly does consent mean?

Who must give consent varies from situation to situation. At least four scenarios have arisen in the context of past United Nations operations. First, and by far the simplest, are situations in which the internationally recognized government is in more or less exclusive control of the state, as in the case of United Nations operations in the Sinai. Second, and in ascending order of complexity, are situations of relative armed equilibrium between the recognized government and rebel forces, as was the case at the initiation of United Nations operations in Lebanon or Cyprus. The issue then arises whether or not consent is required from the rebel forces as well as the government—and the perceived need for rebel consent becomes more acute if they have influential sponsors, as with the

³⁶ Damrosch, Lori Fisler, in *Enforcing Restraint*, *supra* note 28, at 11. *But see*, Bowett, in *U.N. Forces*, *infra* note 38, at 422. Professor Bowett concludes that consent is not part of the constitutional basis for UN forces, but rather just evidence that it is a peacekeeping rather than a peace enforcement operation.

³⁷ Goldmann, Kjell, *Peace-keeping and Self-Defence* 49 (March 1968)(Monograph No. 7, International Information center on Peacekeeping Operations).

³⁸ The Security Council does not need consent if it has made an Article 39 determination of a threat to international peace and security. At least in the earlier operations, it was however considered politically desirable. Bowett, D.W., *United Nations Forces: A Legal Study* 414-15 (1964) (hereinafter *UN Forces*). Nevertheless, in considering the legality of mandatory assessments to fund peace operations, the International Court of Justice placed great emphasis on the fact that the Sinai and Congo operations were consensual. *See Certain Expenses of the United Nations*, 1962 I.C.J. 151.

Greek and Turkish factions on Cyprus. Third, the United Nations may choose to intervene in a scenario wherein the recognized government is but one of two or more active warring factions with limited or no control of the national territory. Examples include Liberia, the Congo, and Bosnia. Finally, and most problematic, the United Nations may be faced with an instance of complete collapse of internal authority within a state, as in Somalia.⁴⁰ Moving through these various scenarios, it becomes apparent that the presumption of consent can become quickly blurred; "In these situations, the 'consent' of the parties—whether governmental, non-governmental opposition groups, or military or paramilitary bodies—may be impossible to seek, verify, or maintain."⁴¹

Before 1991, the United Nations applied a tacit set of criteria to narrow the issue of consent to its peace operations, at a minimum requiring consent from a constitutionally authorized official of the recognized government.⁴² But even these broad criteria present problems in application: conflicts involving self-determination of an ethnic minority or anti-colonial rebellions that lack effective physical control of a significant portion of the state, for example. From the early peacekeeping operations onward, United Nations forces confronted the even more complex issue of whether consent at the theater-wide (operational) level can coexist with discrete instances of hostile military action at the local (tactical) level.⁴³

³⁹ The best example of withdrawal of consent was the Egyptian directive to UNEF I to leave the Sinai in 1967, just before the outbreak of the Arab-Israeli Six Day War in 1967. Hayward, *supra* note 30, at 18.

⁴⁰ Wippman, David, "Military Intervention, Regional Organizations, and Host-Nation Consent," 7 *Duke J. Comp. & Int'l. L.* 209, 214-234 (1996). Wippman's article contains an excellent discussion of most of the examples given above.

⁴¹ Amnesty International, *supra* note 31, at 3.

⁴² Erickson, Richard J., *Legitimate Use of Military Force Against State-Sponsored International Terrorism* 174-75 (1989).

⁴³ Bellamy, Christopher, *Knights in White Armour: The New Art of War and Peace* 56 (1996).

Recognizing the interpretive and operational difficulties in obtaining meaningful consent, the United Nations has nevertheless viewed consent as the critical factor in the legitimacy and ultimate success of its pre-1991 peacekeeping operations. Indeed, much comment has been made upon the importance of consent and the peril of diluting or forsaking consent. Sir Brian Urquhart, wrote in 1990, "A tendency to broaden the United Nations' capacity to intervene in the internal affairs of sovereign states inevitably waters down the 'consent of the parties' principle."⁴⁴ Another commentator stated in regard to loss of consent, "The stark choices are then to withdraw, soldier on, or convert to peace enforcement. While the transition from consent-based peacekeeping to consent-less peace enforcement is difficult, it is not impossible..."⁴⁵ And as recently as 1996, a RAND-sponsored report on peacekeeping asserted, "When the Security Council decides to coerce a recalcitrant party, it *crosses a Rubicon* between noncoercive operations with continuous consent and coercive operations..."⁴⁶

In addition to consent, United Nations forces have maintained that they are strictly impartial—possibly even neutral—actors and not a party to any existing conflict. The concept of neutrality has a long history in international law⁴⁷ and the customarily strict

⁴⁴ Urquhart, Sir Brian, "Beyond the sheriff's posse," 32 *Survival* 203 (1990). Quoted in Hayward, Antony, *Post-Cold War United Nations Peacekeeping and Its Evolution: Hostage or Soldier of Fortune?* 21 (1995).

⁴⁵ Findlay, Trevor, *The New Peacekeepers and the New Peacekeeping* 20 (1996).

⁴⁶ Pirnie, Bruce R., and William E. Simons, *Soldiers for Peace: Critical Operational Issues*, at xiv (1996) (*italics added*) (hereinafter *Operational Issues*).

⁴⁷ See, e.g., Semmes, Raphael, *Service Afloat* 409-412 (on violations of British neutrality through recruitment of seamen by both sides during the American Civil War), Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907) (Article 9 states, "Every measure of restriction or prohibition taken by a neutral Power must be impartially applied by it to both belligerents.").

constraints on the behavior of neutrals⁴⁸ fostered a highly restrictive view of force neutrality by United Nations commanders. Indeed, the classical peacekeeping tenet of impartiality was influenced by both customary and treaty law enjoining neutrals to apply restrictions or prohibitions equally to all parties to a conflict. A former New Zealand Secretary of Defense with some personal experience in Chapter VI operations, Gerald Hensley, emphasized this in 1991 by declaring, "Without impartiality, the United Nations cannot mediate or carry out the traditional supervisory duties. It has joined the conflict... Peacekeeping operations thus cannot move back and forth between Chapters VI and VII."⁴⁹

The issue of impartiality, like consent, has spawned much contentious comment. United Nations forces have been criticized because they have not investigated or publicized human rights violations occurring within areas under their control because of a generally held belief this would compromise force neutrality.⁵⁰ During operations in Angola and Mozambique, a strict application of impartiality, coupled with a perceived imperative to maintain consensus among the various warring factions, resulted in United Nations forces effectively allowing factions to veto human rights complaints made against

⁴⁸ For example, Article 17 of Hague Convention V states, "A neutral can not avail himself of his neutrality—(a) if he commits hostile acts against a belligerent; (b) if he commits acts in favor of a belligerent." Again, in Article 16 Draft Hague Rules of Aerial Warfare (1923), "No aircraft other than a belligerent military aircraft shall engage in hostilities in any form." Both treaty texts can be found in Roberts, Adam, and Richard Guelff, eds., *Documents on the Laws of War* (1983) (hereinafter *Documents*).

⁴⁹ Hensley, Gerald, in *A Crisis of Expectations* *supra* note 27, at 166.

⁵⁰ In 1993, Secretary-General Boutros-Ghali signaled a something of a rejection of this highly restrictive view of impartiality in peacekeeping, stating that UN forces "could not be a silent witness to conduct that might infringe the human rights of the civilian population." Amnesty International, *supra* note 31, at 22-23.

them by opposing factions.⁵¹ With the increased incidence of United Nations humanitarian interventions, impartiality has been roundly attacked:

...[T]here is no such thing as neutral or impartial humanitarian intervention, nor should there be... [T]he flaw in the traditional United Nations "peacekeeping" approach, and the reason why it has been relatively ineffective, is that it insists upon neutrality and impartiality between the abusers and their victims...⁵²

New Peacekeeping in a New World?

Although the Security Council did not readily authorize any Chapter VII enforcement operations after Korea, things changed after the Gulf War. United Nations operations, as well as multinational operations in general, enjoyed a vastly increased cache of respectability within the international community as a result of that conflict. This led to a rising expectation for United Nations intervention in many conflicts or humanitarian disasters that would hitherto have been thought inappropriate for peacekeeping operations. The United Nations did not resist these new expectations. In January of 1992, less than a year after the end of the Gulf War, Secretary-General Boutros-Ghali issued at the request of the Security Council a comprehensive document detailing his vision of a new, expanded, and proactive role for the United Nations in the post-Cold War world order.⁵³ In his *Agenda for Peace*, Boutros-Ghali proposed a much more expansive

⁵¹ *Id.* at 24.

⁵² Tesón, "Collective Humanitarian Intervention," *supra* note 15, at 368-69.

⁵³ Boutros-Ghali, Boutros, *An Agenda for Peace: Preventive Diplomacy, Peacemaking, and Peacekeeping*, (1992) (hereinafter *Agenda for Peace*).

and proactive role for United Nations forces and for United Nations-sponsored operations by regional organizations.⁵⁴

At the same time the Secretary-General was promoting an expansive role for peacekeeping in the traditional role of conflict resolution, the post-Cold War community of nations had begun to adopt an equally expansive view of what constitutes a threat to international peace and security. From the end of World War II until the fall of the Berlin Wall, order within an international system fixated by dread of nuclear conflict was simply defined as the avoidance of a significant U.S.-Soviet confrontation. Everything else was subservient to this overarching principle, including respect for human rights and the propagation of healthy democracies.

Since the end of the Cold War, however, a general political consensus has been achieved, even between the U.S. and the former Soviet Union. Nations almost uniformly accept that the world economic order should be one based upon open trade abroad and liberal free markets at home. Also, with the notable exception of China, the vast majority of states agree hold that some form of representative democracy is at least a universal aspirational right.⁵⁵ With the international system purged at least temporarily of the looming threat of general warfare between superpowers, the world's utility function has shifted to encompass these new emergent goals as international 'goods' to be actively fostered and pursued. Greater possibilities now exist for multilateral conflict management

⁵⁴ See generally, *id.* at 22, Chayes, Abram, and Antonia Chandler-Chayes, eds., *Preventing Conflict in the Post Communist World: Mobilizing International and Regional Organizations* (1996); but see, Franck and Rudley, *supra* note 15.

⁵⁵ U.S. Secretary of State Madeleine Albright, while serving as U.S. Ambassador to the United Nations delivered a speech in November 1993 outlining the why (and when) the U.S. would participate in United Nations operations—the first of her reasons was that the U.S. would remain “an active proponent of democracy, free markets, and international law.” Albright, Madeline K., “Building a Consensus on International Peace-keeping,” *U.S. Department of State Dispatch* (November 15, 1993) 789, 790-91.

involving self-determination, ethnic nationalism, or gross human rights abuses. However, hubris should be avoided for, as Lucienne Beuls points out, "regional conflicts are now decoupled from superpower rivalry... [and] may be freer to escalate to higher levels of violence."⁵⁶

The resulting rapid expansion in the universe of United Nations operations has been quite breathtaking. Between 1989 and 1996, forty-nine nations, from Russia to Cape Verde, became first-time participants in United Nations operations.⁵⁷ Academics and international bureaucrats have both reflected and added to the conceptual confusion surrounding these new types of United Nations operations.⁵⁸ One former British peacekeeper pointed out, "[T]erms that supporters of the 'expanded peacekeeping' like to throw about are proliferating, and one struggles to keep up... [W]e have 'international stability operations,' 'order creation,' 'second generation multinational operations,' 'preventive deployment,' 'humanitarian intervention'..."⁵⁹ Governments and the United Nations are no closer to consensus on what to call this new peace operations phenomenon. The United Nations refers routinely to "second generation peacekeeping." The British Army's Headquarters, Doctrine and Training, has entitled their new field

⁵⁶Christie, Kenneth, *Peacekeeping or Peace Enforcement?*, in *A Crisis of Expectation*, *supra* note 27, at 253.

⁵⁷ Findlay, *supra* note 45, at 9. Another twenty-four nations became first-time participants in non-UN multilateral missions. *Id.* at 10.

⁵⁸ A study commissioned by RAND is a case in point. The authors developed a five-part typology of peace operations (observation, interposition, transition, security for humanitarian aid, and peace enforcement) and then forced all operations, past and present, into one of these five categories. In the process, the authors misplace and oversimplify many operations, as well as fail to see the complexity in operations that traverse the categories. It is not entirely clear outcome this report produces, other than additional confusion. Pirnie, Bruce R., and William E. Simons, *Soldiers for Peace: An Operational Typology* 9-64 (1996) (hereinafter *Operational Typology*).

⁵⁹ Allan, James H., *Peacekeeping: Outspoken Observations by a Field Officer* 6-7 (1996). One of the silliest, albeit more descriptive, attempts at categorizing peace operations was made by a fairly respected commentator, Alan James, who divides these operations into "classical peacekeeping," "peace

manual “Wider Peacekeeping.” And Canada’s Pearson Peacekeeping Centre in Nova Scotia refers to a “New Peacekeeping Partnership.”⁶⁰ Former Representative Pat Schroeder admitted frustration in 1993, “...I as a policy maker am very frustrated by this debate going on now concerning collective security when the UN says we [the U.S.] do peacemaking and the UN will do peacekeeping. That line is fuzzy... I just do not understand this peacekeeping, peacemaking.”⁶¹

Emerging International Norms: Expanding the Field for Peace Operations

The lion’s share of the confusion between old-style peacekeeping and the broader United Nations operations undertaken since 1991 centers on the fading boundaries of non-interference. Alan James describes this as a blurring of the hitherto fairly strict separation of state sovereignty into three separate categories: *jurisdictional* sovereignty (legal freedom to act within one’s borders), *political* sovereignty (freedom to pursue various courses of actions internally or externally), and *international* sovereignty (formal independence to act as a player within the international system).⁶² While even under a Westphalian version of sovereignty states were free to meddle with one another’s political and international sovereignty—that is exactly what diplomacy and alliances are for—a state’s jurisdictional sovereignty was meant to be inviolate. Early commentators on United Nations operations followed this line, asserting that United Nations forces must

enforcement,” and “prickly peacekeeping.”). James, *supra* note 32, at 265-71 (Thakur, Ramesh, and Carlyle A. Thayer, eds., 1995).

⁶⁰ Bair, Andrew, *The Changing Nature of Civil-Military Operations in Peacekeeping*, in *The New Peacekeeping* 68 (Morrison, Alex, ed., 1995).

⁶¹ *The Use of Force in the Post-Cold War Era: Testimony Before the House Committee on Armed Services*, 103d Cong. 18 (3-4 March 1993) (hereinafter *Hearings on Use of Force*).

⁶² James, *supra* note 32, at 263-64.

only be involved in countering threats to international peace, not *internal* peace. To do otherwise would “involve the suppression of the right to self-determination which must still, at the present stage of the evolution of international security, be deemed to include a right to revolt...”⁶³

Beginning with the United Nations Charter and the Universal Declaration of Human Rights, a new set of explicit international norms developed—and at the expense of internal jurisdictional sovereignty. Although the Cold War slowed the practical application of an expansive view of individual and collective human rights, the growth of the body of international human rights law continued apace. With a renewed sense of cooperation among the permanent members of the Security Council, the lengthy list of heretofore “aspirational” rights contained in international treaties are now taken quite seriously within the international community.⁶⁴ Out of this process, new norms of international behavior have arisen allowing—even demanding—intervention to stop gross abuses of human rights and to prevent the subversion of representative government.

Some hints of these new roles for United Nations forces can be discerned even in earlier operations. ONUC, while fighting mercenaries and rebels in Katanga, actually administered parts of the Congo for some time. The UNSF and UNTEA operations in 1962 and 1963 took over the province of Irian Jaya during the transition from Dutch to Indonesian rule. UNIFIL conducted some armed deliveries of humanitarian aid within various areas of Lebanon.⁶⁵

⁶³ Bowett, *UN Forces*, *supra* note 38, at 425-26.

⁶⁴ Pressure on states to openly accept international human rights conventions is substantial. As a result, for example, in March 1998 China announced it would join the Convention on Civil and Political Rights.

⁶⁵ Findlay, *supra* note 45, at 20-21.

These two emerging rights—respect for human rights and representative government—are tightly correlated. After the post-1945 treaty regime removed human rights from the exclusively internal jurisdiction of states, there emerged a general recognition that democratically chosen governments are the only effective way, other than forceful external intervention, to guarantee ongoing and systematic respect for human rights within states.⁶⁶ Additionally, democratic governments provide representative legitimacy and tend not to fight with their neighbors,⁶⁷ thereby significantly lessening the potential for internal insurrection and external aggression, both of which are poisonous to human rights. International human rights treaties generally contain clauses allowing derogation (except of the most essential rights) in times of emergency. However, as evidence of an emerging view of the inviolability of all human rights, the members of the Conference on Security and Cooperation in Europe, at a 1991 meeting in Moscow, agreed to refrain from the suspension of any human rights protections even during states of emergency.⁶⁸

Where this emerging norm of intervention is most evident is in the area of humanitarian relief, perhaps the most basic form of support for human rights. The International Covenant on Economic, Social, and Cultural Rights declares that all people have the *fundamental* right to be free from hunger.⁶⁹ Many in the community of non-governmental organizations have overtly asserted there exists a right of all people to humanitarian assistance, as well as a correlative duty upon states to provide such

⁶⁶ Tesón, *supra* note 15, at 330-34.

⁶⁷ *Id.*

⁶⁸ Gasser, Hans-Peter, "Humanitarian standards for internal strife: A brief review of new developments," *Int'l. Rev. of the Red Cross* (May-June 1993) 221, 225.

assistance.⁷⁰ The first new United Nations operations undertaken after the Gulf War, northern Iraq and Somalia, were humanitarian assistance operations, albeit with a second important objective of ending gross human rights violations.⁷¹ That international law is peculiarly unsuited to deal with intervention in a chaotic or hostile environment for humanitarian purposes has not dissuaded collective action—"Does it make a difference whether it is a civil or an international war? Basically, for the ICRC, it does. For virtually no one else is there a very significant difference at all, in terms of making a decision to go in."⁷² Nevertheless, some disagreement surrounds United Nations interventions for strictly humanitarian purposes. On the one hand, authority granted under Article 39 suggests that if the Security Council determines a humanitarian disaster or pattern of human rights abuses constitutes an international threat—even if wholly internal to an individual state—then it is a threat to international peace and security *de facto* and *de jure*. The Security Council has taken a rather broad view of which internal disorders constitute an

⁶⁹ International Covenant on Economic, Social, and Cultural Rights, art.11, in *Basic Documents*, *supra* note 3, at 259.

⁷⁰ International Committee of the Red Cross, *The Mohonk Criteria for Humanitarian Assistance in Complex Emergencies* (1994). Sponsored by the Program on Humanitarian Assistance of the World Conference on Religion and Peace, the Mohonk Conference was composed of representatives from many international humanitarian NGOs and produced detailed guidelines on how developed nations should comply with the "humanitarian mandate."

⁷¹ Professor Tesón goes as far as to say of Somalia, "This is a pristine case of collective forcible intervention to put an end to a civil war during which warring factions have committed serious violations of human rights." Tesón, *supra* note 15, at 352. Although there is some truth to this, he overstates his case. It is unlikely any forcible intervention would have occurred had the Somalia civil war and attendant human rights abuses continued without the famine. It was the images of starving people—not political prisoners—that compelled world action.

⁷² Weiss, Thomas, "The United Nations and Civil Wars," in *The New Peacekeeping* 75 (Morrison, Alex, ed., 1995). Weiss notes that the Geneva Conventions and Protocols have over 530 articles on international conflicts, and 29 on civil wars. See also, Gasser, *supra* note 68, at 221. Geneva Protocol I devotes an entire chapter to relief operations, but only envisions such operations in a consensual environment. In Article 70 of Protocol I, relief operations are subject to the approval of the relevant parties and must be "impartial in character." Article 71 cautions against relief personnel exceeding the "terms of their missions," allowing for termination of the relief mission under such conditions. Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), in *Basic Documents*, *supra* note 3, at 428-30.

international threat, finding in the former Yugoslavia for example that the potential for cross-border aggression, significant refugee flows, or human rights violations provide sufficient justification.⁷³ On the other hand, it is not entirely certain that the Security Council has absolute authority to declare an otherwise internal matter an international threat; the United Nations Charter contains a traditional statement of a state's right to internal autonomy in Article 2(7). Although the Security Council can reprimand states and impose sanctions for internal transgressions, no forceful intervention is allowed under such circumstances.⁷⁴ Regardless of justification, however, lingering criticism surrounds humanitarian operations, including dissatisfaction at the slow response of the United Nations, the tacit requirement for a cease-fire before United Nations forces will be deployed for humanitarian operations, the Security Council's low level of acceptable risk to United Nations forces, and perennial funding shortfalls.⁷⁵

Intervention to support democratic government is a more controversial matter. Although again several international conventions guarantee all peoples the right to self-determination, this does not necessarily equate to a right to democracy. Since the end of the Cold War, this distinction has blurred. Over the last 15 years, the United Nations has embarked on a series of operations designed in whole or in part to establish, restore, or

⁷³ Steinberg, James B., "International Involvement in the Yugoslavia Conflict," in *Enforcing Restraint*, *supra* note 28, at 49-50.

⁷⁴ Tesón, "Collective Intervention," *supra* note 15, at 337-38. On a more basic level, the argument between "contextual" versus "universal" human rights continues. As recently as 1993, several Asian nations joined in the Bangkok Declaration, declaring that human rights should be viewed in various historical, cultural, and religious milieus. Signatories included China, Vietnam, Indonesia, Iran, Syria, Myanmar, and Singapore. The United Nations Human Rights Commission's 1994 Geneva conference echoed this concern. Marshall, Paul, "Universal Rights and the Role of the State," in *Sovereignty at the Crossroads*, *supra* note 1, at 153-157. However, the kinds of systematic human rights and humanitarian abuses which have thus far warranted United Nations intervention would probably fall within the definition of "universal."

protect democratically elected governments, with examples including Bosnia, Cambodia, El Salvador, Angola, Mozambique, Somalia, and Haiti.⁷⁶ The paradigm case for collective action to enforce “aspects of the democratic settlement” was South Africa and Rhodesia during the 1970s and 1980s,⁷⁷ but the purest example of intervention to support democratic institutions were the 1994 operations in Haiti wherein a United Nations sponsored force,⁷⁸ at the invitation of the elected but exiled Haitian President Aristide, actually transferred political authority from an in-place government in control of the Haitian state apparatus to a democratically elected president.⁷⁹

Particularly in the context of forceful intervention to support democratic government, there is a lingering feeling among many poor or relatively newly independent states that the new expansive attitude toward intervention in what were heretofore internal matters is tainted by lingering traces of neo-imperialism or neo-colonialism. The international legal regime surrounding the law of armed conflict emerged during the last great colonial epoch—the ignoble scramble for Africa—and is viewed somewhat skeptically by many as a mechanism for “retrograde colonial interference,” a product, as Jomo Kenyatta said, of “the so-called civilizing missions which meant the subjugation of

⁷⁵ Clark, Jeffrey, “Debacle in Somalia: Failure of the Collective Response,” in *Enforcing Restraint*, *supra* note 28, at 233-35.

⁷⁶ James, *supra* note 32, at 271-78.

⁷⁷ Acevedo, Domingo E., “The Haitian Crises and the OAS Response: A Test of Effectiveness in Protecting Democracy,” in *Enforcing Restraint*, *supra* note 28, at 137-39.

⁷⁸ See UNSCR 940 (31 July 1994), U.N. Doc. S/RES/940 (1994). Paragraph 4 of the resolution stated that the force acting under Article VII was authorized to “use all necessary means to facilitate the departure from Haiti of the military leadership... and the restoration of the legitimate authorities of the Government of Haiti...”

⁷⁹ The issue of whether or not the exiled Aristide had the authority to request United Nations intervention was seemingly settled by the fact that the Organization of American States recognized him as the only legitimate leader of Haiti. *Id.* at 139.

the African races to a perpetual state of serfdom.”⁸⁰ Many developing countries, particularly in Asia and the Middle East, assert that strict non-intervention is their only real protection against more powerful wealthy states.⁸¹ The United Nations organ responsible for determining threats to international security and authorizing intervention, the Security Council (with its permanent member veto procedure), has long suffered from a kind of “democracy deficit.” Article 12(1) of the United Nations Charter, the General Assembly cannot even make recommendations on security matters unless requested by the Security Council.⁸² Many developing countries see the Security Council’s selectivity in determining when and where to intervene as a form of neo-imperialism—ignoring Panama, Tibet, and Lebanon while squashing Iraq or Somalia—resulting from the old colonial powers on the Security Council, the severely limited mechanisms for Security Council consultation, and a cavalier attitude toward intruding on the domestic jurisdiction of less powerful states.⁸³ Generally, the attitude of powerful wealthy states may have contributed significantly to some significant failures of recent years, as Michael Ignatieff asserts in *The Seductiveness of Moral Disgust*:

What else but imperial arrogance could have led anyone to assume that any outside power... could have gone into Somalia, put an end to factional fighting and exited, all within months? Who but a European or American could have believed that the simple ‘exercise of our will’ could have stopped the Yugoslav catastrophe? Was our intervention there not coloured by an imperial hubris which

⁸⁰ Njoya, Adamou Ndam, “The African Concept,” in *International Dimensions of Humanitarian Law* 9-10 (Henry Dunant Institute, 1988).

⁸¹ Weiss, *supra* note 72, at 77.

⁸² Hayward, *supra* note 30, at 7.

⁸³ *Id.* at 19-20.

believed we have a right to spread civility among the sub-rational zones of the world?"⁸⁴

Although most wealthy states may view their participation in operations to deal with human rights disasters or to ensure democratic institutions as an ethical duty, other states may perceive such activity differently; what one "deems intervention in the service of humanity may appear to another like old-fashioned aggression."⁸⁵ That even powerful states seem uncertain as to what the "new peacekeeping" is designed to do only exacerbates this tension.⁸⁶

New Rules for New Operations: Emergence of a 'Just Intervention' Theory?

Somalia and the Kurdish relief mission in Iraq, the first post-Gulf War operations,⁸⁷ battered at the established norms of classical peacekeeping. Quickly followed by other missions in Bosnia, Cambodia, and Haiti, most of these operations sought *specific*, if need be *coerced*, mission goals determined by the Security Council. Formal consent in most of these operations was neither sought nor likely to be forthcoming. In the case of the Kurds in northern Iraq, the Iraqi government was not likely to consent to any operations within its own borders against its own forces—as the recent loser in the Gulf War, Iraqi consent

⁸⁴ Ignatieff, Michael, *The Seductiveness of Moral Disgust* (1995), quoted in Bellamy, Christopher, *Knights in White Armour: The New Art of War and Peace* 33 (1996).

⁸⁵ Farer, *supra* note 29, at 326.

⁸⁶ For example, when asked during House hearings on the use of United States forces in United Nations operations whether the violence in Bosnia was "aggression or civil war," Professor Susan Woodward, a Brookings Institute fellow, responded, "No, it's a third thing. It is a collapse of a state and the creation of new states out of an old one where the internal borders are in contest, because the principal of the new states is the national right to self-determination and there are not nationally homogenous areas." *Hearings on the Use of Force*, *supra* note 61, at 96.

⁸⁷ The first of the United Nation's attempts at "comprehensive" peace settlements through United Nations operations pre-dates the Gulf War—Namibia in 1988—but the great rush of comprehensive settlements and Chapter VII operations began with the end of the Gulf War. Amnesty International, *supra* note 31, at 5.

was of little interest anyway.⁸⁸ In Somalia, there was no effective government, with political power shared between a dozen or more warring clan factions. Civil society in Cambodia had all but been eradicated during the Khmer Rouge rule. Bosnia was a state with a recognized government with no control over the majority of its national territory. Haiti was in a state of anarchy, with a popularly chosen president who had not been in the country since shortly after his election. The possibility for obtaining the traditional consent of the parties was approaching zero. However, classical consensual operations maintained a tenuous foothold in the new environment—one of the more successful, albeit quiet, operations undertaken since 1991 is the United Nations Preventive Deployment in the Former Yugoslav Republic of Macedonia (UNPREDEP) which has presented to Serbia and other neighboring states a deterrent to incursions within Macedonia.⁸⁹

As a final blow to classical peacekeeping theory, the Security Council, beginning with operations in northern Iraq, demonstrated a marked willingness to approve operations under Chapter VII and to authorize all necessary means to accomplish force mandates.⁹⁰ It is the Security Council's willingness to deviate from the established principles of classical peacekeeping without clearly articulating new normative principles that has resulted in the highly ambiguous nature of many new operations.⁹¹

⁸⁸ "No principle seems clearer but that a state determined by a competent United Nations organ to be an 'aggressor,' and against which sanctions—or 'preventive or enforcement action'—are decided upon cannot stultify United Nations action by withholding its consent." This has become known as the "forfeiture theory." Bowett, *UN Forces*, *supra* note 38, at 412.

⁸⁹ Pirnie and Simons, *Operational Issues*, *supra* note 46, at 14. The authors characteristically oversell the presence of UNPREDEP, stating that its presence indicates that "the Security Council will respond strongly" to any breach of Macedonia's borders. This is a highly-wrought interpretation of the presence of a very small (two battalion) force in a poor country of marginal significance even within the Balkans. Macedonia is more of an emotional than a strategic issue, particularly for the Greeks and Albanians.

⁹⁰ See, e.g., UNSCR 929, ¶3 (Rwanda), U.N. Doc. S/RES/929 (1994); UNSCR 940, ¶4 (Haiti), U.N. Doc. S/RES/940 (1994); UNSCR 816, ¶4 (Bosnia), U.N. Doc. S/RES/816 (1993).

⁹¹ James, *supra* note 32, at 264.

Nevertheless, with no coherent accepted rules to replace them, the United Nations and member nations participating in peacekeeping missions continued applying the old peacekeeping criteria. The results ranged from merely confused in northern Iraq to thoroughly disastrous in Bosnia. In Bosnia for example, UNPROFOR commanders tried desperately to impose classical peacekeeping rules on the conflicting realities of their mission. The result was near-paralysis due to fear of violating impartiality and subsequent tragedy on a large scale in Sarajevo, Zepa, Srebrenica, and Bihac.⁹²

Under what circumstances intervention should take place has generated proposals from several respected commentators. Stanley Hoffman, acknowledging that consent of the parties is no longer a viable threshold for intervention., proposes that the international community should intervene only in one of two circumstances. First, intervention would be appropriate in circumstances that truly threaten international peace and security. Professor Hoffman warns that the United Nations Security Council's "capricious" application of this criteria has caused a dilution of its moral authority. Therefore, he proposes re-recognition of a second traditional justification for intervention: for humanitarian purposes in the face of "massive and systematic suffering." Professor Hoffman acknowledges that difficulties will inevitably arise when defining what constitutes "massive and systematic" in this context, . but recommends as criteria massive human rights violations encompassing genocide, ethnic cleansing, and forceful repression of a

⁹² The relief/no-fly zone missions in northern Iraq (Operations Provide Comfort I, Provide Comfort II, and most recently Northern and Southern Watch) have relied more upon residual authority from the Gulf War than classical peacekeeping rules.

population; famines; massive breakdowns of law and order; epidemics; and massive flights of refugees from the collapse of "failed" states.⁹³

More pragmatically, some emerging international norms regulating forceful interventions by multinational forces have been discernible since at least 1993 from the nature of Security Council authorizations for new operations. These include prevention of genocide or atrocities (Yugoslavia, Iraq, Liberia, and Rwanda); ensuring humanitarian relief (Yugoslavia, Iraq, Somalia); enforcement of cease-fires (Yugoslavia, Somalia, Cambodia, and Liberia); preventing serious civilian losses attendant upon the collapse of civil authority (Liberia, Somalia); and prevention of interference with democratic government (Haiti).⁹⁴ Although some of these justifications for forceful intervention (e.g., prevention of genocide) are more universally recognized than others (e.g., enforcement of cease-fires), this represents a fairly comprehensive listing of emergent normative justifications. In 1994, the American Conference of Catholic Bishops, in a document entitled, "The Harvest of Justice is Sown in Peace," sanctioned military intervention "...to ensure that starving children are fed or that whole populations will not be slaughtered" based on Augustine's principle that love may require the use of force to protect the innocent.⁹⁵

Another commentator, Bryan Hehir, has proposed incremental changes to the existing Westphalian-derived system of noninterference among sovereign states by adapting by analogy the concept of "just war" developed during the middle ages to a notion of "just intervention." Father Hehir begins by maintaining a *presumption* that states

⁹³ Hoffman, Stanley, "The Politics and Ethics of Military Intervention," *Survival*, vol. 37:4 (1995-1996), pp. 9-10.

⁹⁴ Damrosch, *supra* note 28, at 12-13.

should not interfere within each other's borders. A rejection of this presumption would, in his view, constitute the first step down a dangerous slippery slope—and most leaders of developing states who came of age steeped in the dependency theorists' fear of neocolonialism would surely agree. However, the second step would then be to reach some consensus as to what exceptions should be allowed to this presumption. Some exceptions seem fairly obvious; most would agree the prevention of genocide and systematic starvation are legitimate reasons for intervention. However, some exceptions are not so unanimously apparent—what about self-determination? guaranteeing democratic institutions?⁹⁶ Professor Hoffman's criteria for intervention may be instructive on this point. Third, there must be an acceptance of the necessity for some limit on *which* states should be allowed to intervene, requiring that any intervention receive prior multilateral authorization. For the present, that would mean United Nations Security Council approval. Finally, before any force is actually used, there must be some consensus that the means to be employed have reasonable potential for actually stopping or remedying the specific injustice without causing disproportionate harm to innocent people.⁹⁷ This represents something of a nod to pragmatism, acknowledging that a just-do-something approach can often be counterproductive—we simply cannot fix all problems. In this regard, we should keep in mind what the theologian Paul Ramsey wrote in 1965: a statesman "...is not called to aim at all the humanitarian good that can be aimed

⁹⁵ Johnson, *supra* note 12, at 137.

⁹⁶ Philpott, *supra* note 1, at 56-57.

⁹⁷ Hehir, J. Bryan, "Intervention: From Theories to Cases," *Ethics and International Affairs*, Vol. 9 (1995), 1-13 (presented as the 13th Annual Morgenthau Memorial Lecture on Ethics and Foreign Policy, February 17, 1994). See also, Philpott, *supra* note 96, at 57. Professor Philpott refers to the requirement of having some reasonable chance of success without doing inordinate harm as a standard of "moral prudence."

at in the world. Instead, he must determine what he *ought to do* from out of the total humanitarian *ought to be*.”⁹⁸ Such discussions of guidelines for restricting ‘just interventions’ are, to a certain extent, a siphoning of old unilateral wine into new multilateral bottles. Customary international law has for some time recognized certain justifications for and limits on unilateral interventions⁹⁹ that generally mimic those proposed by recent commentators.¹⁰⁰

With what appears to be a formidable body of law, theory, and opinion supporting an international right to intervene for broad humanitarian reasons, why then do states and the United Nations go to such lengths to justify interventions on more traditional grounds? For example, why in 1992 did the U.S. State Department’s Legal Advisor’s Office, citing the highly dubious precedents of the Dominican invasion of 1965 and the intervention in the Boxer Rebellion of 1900-901, tell President Bush that intervention in Somalia was legally authorized to protect American citizens (apparently aid workers and military airlift support personnel)¹⁰¹ rather than by an international norm of humanitarian intervention? Did not Somalia as a state forego its sovereignty by sinking into odious internecine bloodshed and gross disregard for even the most basic standards human rights?¹⁰² Why must the State Department search customary international law regulating unilateral interventions to find a time-honored—if spurious under the circumstances—justification in protection of nationals? Is it even “...obvious that the same constraints should necessarily

⁹⁸ Quoted in Johnson, *supra* note 12, at 133.

⁹⁹ See, e.g., Arend, Anthony Clark, and Robert J. Beck, *International Law and the Use of Force* 11-25 (1993).

¹⁰⁰ Generally, unilateral intervention is considered justified in response to grave human rights violations or to protect one’s own nationals only if there is no alternative to prevent irreparable harm, minimum force is used, forces are withdrawn as soon as possible after abuses are halted, and the intervention as planned would cause less overall damage than inaction. See, Farer, *supra* note 29, at 327.

¹⁰¹ Dycus, Stephen, *et al*, *National Security Law* 380-384 (2d ed. 1997).

apply when an authorized organization acts on behalf of all humanity?"¹⁰³ Isn't a Security Council resolution enough?

The answer to the last question is perhaps no, and that is the problem that underlies much of the residual confusion regarding "just interventions." For the United Nations Charter contains ambiguity that, coupled with a reluctance to disregard the time-tested Westphalian principle of sovereign internal autonomy, makes many leaders uneasy even when faced with universal abhorrence at gross human rights violations. After all, the Security Council's mandate to use force is limited by the terms of the Charter to safeguarding international peace and security. Although the Security Council has authorized several humanitarian operations, there remains a nagging suspicion—evident even in a not insignificant portion of American public opinion¹⁰⁴—that most such humanitarian disasters are simply not proximate threats to international peace and security. In the final analysis, the Security Council's power to use force does not extend to threats to international conscience and peace of mind.

¹⁰² Connaughton, *supra* note 10, at 67-68.

¹⁰³ Damrosch, *supra* note 28, at 3.

¹⁰⁴ See, e.g., Kull, Steven, and Clay Ramsay, *U.S. Public Attitudes on UN Peacekeeping* (1994), *U.S. Public Attitudes on U.S. Involvement in Haiti* (1994), and *U.S. Public Attitudes on U.S. Involvement in Somalia* (1993). In each of these surveys of U.S. public opinion, a significant minority opposed intervention by the U.S. or the UN in any state's internal affairs: 36% opposed any UN peacekeeping intervention, 48% opposed intervention in Haiti, and 35% opposed intervention in Somalia. However, in their 1994 opinion survey of UN peacekeeping generally, Kull and Ramsay found Americans more likely to support UN intervention in response to "large-scale atrocities" or "gross human rights violations" (83% and 81% respectively) than to stop "civil wars" (69%). Kull and Ramsay, *UN Peacekeeping*, at 5. The authors concluded, "Overall what is most surprising is how few respondents consistently opposed UN peacekeeping; apparently peacekeeping resonates with deeply held American values." *Id.* at 23.

Chapter Two: Self-Defense and the Use of Force in United Nations Operations

The basic authority for the United Nations to engage in any use of force rests in Article 39 of the United Nations Charter.¹⁰⁵ Although this article grants fairly sweeping authority to the Security Council, early in the United Nations history the Soviet delegation argued that failure to establish the permanent United Nations force envisioned under Article 43 of the Charter meant that the Security Council was precluded from any use of force, even in response to an Article 39 determination of a threat to international peace and security.¹⁰⁶ This position, although not entirely outside the realm of a fair reading of the Charter, was rejected by the International Court of Justice¹⁰⁷ and was subsequently abandoned by the Soviets as well.

In pre-1991 classical peacekeeping, the United Nations operated under a self-imposed restriction to use of force only in self-defense. As was shown in chapter one, the other two tenets of classical peacekeeping, consent and impartiality, were problematical even in the heyday of classical peacekeeping. The United Nations has wisely (and inevitably) jettisoned them as *sine qua non* requirements for most of the new operations undertaken since 1991. Although the Security Council has become more willing to include "all necessary means" language in resolutions authorizing United Nations operations since the Gulf War, the notion that United Nations forces only use force in self-defense needs some deconstruction.

¹⁰⁵ "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression..."

¹⁰⁶ Bowett, *supra* note 38, at 276-77.

¹⁰⁷ See generally, *Certain Expenses case*, *supra* note 38.

The customary recognition of self-defense as a justification for the use of force by one state against another was limited to three circumstances: to reclaim something wrongfully taken, to punish general wrongdoing, and in defense of the state or its citizens.¹⁰⁸ Although in this century the League of Nations Charter,¹⁰⁹ the Kellogg-Briand Pact,¹¹⁰ and the United Nations Charter¹¹¹ all strictly limited the use of force to self-defense, some authors have argued that customary international law still allows the use of force on the other two grounds as well.¹¹²

From its first peace operation in the Sinai in 1958, the United Nations has struggled with the notion of the use of force by its peacekeepers—the idea of killing people in order to save them persists as something of a moral paradox. In commenting upon the possible use of force by UNEF, Secretary-General Hammarsköld asserted, “The basic element involved is clearly the prohibition against any *initiative* in the use of armed force.”¹¹³ UNEF’s Swedish battalion issued a standing order that included a statement limiting the use of force to three instances: when fired upon, when attacked by armed persons [presumably whether or not they fire], or when armed persons approach with the

¹⁰⁸ See, e.g., Bowett, D.W., *The Use of Force for the Protection of Nationals Abroad*, in *The Current Legal Regulation of the Use of Force Abroad* 39, 40-48 (Cassese, A., ed., 1986). Bowett lists several examples of the significant use of force nominally to protect nationals abroad, such as by the Belgians in the Congo (1960), by the British in Suez (1956), and by the Americans in the Dominican Republic (1965).

¹⁰⁹ The Covenant of the League of Nations stated in Article 10, “The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and political independence of all Members of the League.” 3 *Treaties, Conventions, International Acts, Protocols, and Agreements of the United States* 3339 (1923).

¹¹⁰ The Kellogg-Briand Pact renounced war “for the solution of international controversies” and “as an instrument of national policy.” Treaty Between the United States and Other Powers Providing for the renunciation of War as an Instrument of National Policy, art. I, 4 *Treaties, Conventions, International Acts, Protocols, and Agreements of the United States* 5130 (1938).

¹¹¹ The United Nations Charter states at Article 2(3), “All members shall settle their international disputes by peaceful means...” and at Article 2(4), “All members shall refrain in their international relations from the threat or use of force...”

¹¹² Johnson, *supra* note 12, at 130.

¹¹³ Goldmann, *supra* note 37, at 11.

“obvious intention” of attacking.¹¹⁴ Although UNEF did briefly confront some resistance to its operations in the Gaza Strip, this threat was defused by the scaling back of United Nations operations in Gaza and UNEF encountered no further serious threat. The limits of neither the Secretary-General’s nor the Swedish commander’s conception of self-defense were seriously tested. In his first interim report to the Security Council on “experiences derived from establishment of the Force,” the Secretary-General underscored the limited circumstances for use of force by UNEF.¹¹⁵ The second United Nations peace operation, however, would be another matter.

Soon after the Belgian Congo achieved independence in 1960, a separatist movement in the Katanga province, supported by mercenaries primarily from Belgium and South Africa, threatened to dismember the state.¹¹⁶ The United Nations intervened at the request of the government of the Congo, with the Security Council authorizing a United Nations force to prevent the escalation of violence in the Congo. By December 1961, the United Nations force, ONUC, had deployed over 6,000 well-armed troops supported by jet aircraft. This was an operation on a much larger and more dangerous scale than that undertaken in the Sinai by UNEF. Although ONUC operated with the consent of the internationally recognized government of the Congo, there was an expectation that the United Nations force would meet with some resistance from the Katangan separatists. After occupying most of Katanga province, ONUC set about

¹¹⁴ *Id.*

¹¹⁵ The Secretary-General pointed out that since UNEF was undertaken with the consent of the parties and under a Chapter VI mandate, he specifically stated that his report did “not cover the type of force envisaged under Chapter VII of the Charter.” The report also asserts that peace operations require the consent of the host country. *Report of the Secretary-General: summary study of the experience derived from the establishment and operation of the Force*, UN Doc. A/3943 (9 Oct 58), ¶155-156.

¹¹⁶ Jit Rikhye, *supra* note 34, at 211-15.

quashing the rebellion by force of arms.¹¹⁷ Although this type of operation could arguably be authorized by the Security Council under Article 42 of the Charter as an “action by air, sea, and land forces as may be necessary to maintain or restore international peace and security,” ONUC operated throughout under the self-imposed limitation of using force in self-defense only—the ONUC force regulation repeated exactly the UNEF restrictions on the force.¹¹⁸

The Security Council cut the knotty problem of the use of force in the Congo through a semantic compromise proposed by the Russian delegate Kutznetsov. The Security Council, following the Russian’s logic, adopted a definition of self-defense encompassing not only the customarily recognized right to resist attacks or threats of attack against the force, but also a right to use force to ensure the accomplishment of “active tasks” assigned by the Security Council. If ONUC used force to accomplish any task enumerated in its mandate, including the forceful removal of Belgian and other mercenaries, that use of force would henceforth be considered “self-defense.”¹¹⁹ This was a great expansion on the original conception of peacekeeping as the “...projection of the principle of non-violence onto the military plane;”¹²⁰ this was offensive field operations, regardless what the Security Council called it.

In an interesting analysis of the use of force written in 1968 after just a handful United Nations peace operations, Kjell Goldmann discerned some emerging norms for

¹¹⁷ *Id.* at 215-16.

¹¹⁸ Regulations for the United Nations Force in the Congo, UN Doc. ST/SGB/ONUC/1 (15 Jul 63), ¶43.

¹¹⁹ *Id.* at 35-44. One commentator suggests that given an expansive view of self-defense, operations like UNEF and ONUC could be considered Article 41 “measures not involving the use of armed force” since they would only be using force (even fairly substantial force as was the case with ONUC) in self-defense and would thereby never abandon their “non-military character.” No other commentator has subsequently proposed this. Bowett, *supra* note 38, at 279.

United Nations forces. Beginning with the “active tasks” paradigm developed for ONUC, Goldmann asks six questions concerning a force’s ability to use force: 1) Can they use force to insure the accomplishment of “active tasks”? 2) Can the amount of force be escalated? 3) Can force be used for anticipatory self-defense? 4) Can force be used to ensure freedom of movement? 5) Can force be used to prevent violence against United Nations forces? 6) Can force be used to exploit an otherwise lawful military victory?¹²¹

In contrasting the UNEF and ONUC responses to these questions, Goldmann demonstrates the rapid extension of the authorization to use force in United Nations operations. First, both operations authorized the use of force to carry out “active tasks,” but UNEF would only use force in this situation if all parties agreed—effectively limiting the use of force to repelling bandits or pilferers. ONUC, on the other hand, used force to ensure “active task” accomplishment even in the face of stiff armed resistance. As to the second and third questions, escalation and freedom of movement, UNEF did not have to contend with any serious challenges in these areas, but ONUC routinely used escalating force (offensive air support is a good example) when thought necessary and suffered no interference with its freedom of movement. Fourth, although UNEF was authorized to use force preemptively in self-defense, the Swedish standing orders made it clear this was intended only in the face of an obvious and immediate intention to use armed force. Taken in conjunction with the fifth question on prevention of violence to United Nations forces, ONUC applied anticipatory self-defense quite expansively, authorizing the forceful removal of all *possible future* threats to the force. Finally, UNEF did not

¹²⁰ From Sir Brian Urquhart’s autobiography, *A Life in War and Peace*, quoted in Collett, Stephen, “Humanitarian Peacekeeping: Ethical Considerations,” 160, in Morrison, Alex, ed., *The New Peacekeeping* (1995).

¹²¹ Goldmann, *supra* note 37, at 5-9.

contemplate the exploitation of a military victory since it was a scenario unlikely to arise within their mission environment. ONUC, on the other hand, allowed force to exploit victories even if designed merely to assist with the accomplishment of “active tasks.”¹²²

Taken together, it is difficult to see how the ONUC-era definition of self-defense differs much from general warfare. The hallmark of general warfare, declaration of a hostile force, is explicitly absent—although it was implicitly clear who the enemy was in the Congo—the combined effect of “active tasks,” anticipatory self-defense, and exploitation of victories adds up to a piecemeal authorization for a general armed conflict. For example, with ONUC engaged in hostile field operations against Katangan rebel forces, the use of force to eliminate *possible future* threats to the United Nations force would logically encompass the engagement of *any and all* Katangan or foreign mercenary forces wherever found on the premise that any armed and hostile force represented *a possible future* threat to ONUC. Again, an air or ground operations planner would discern little difference between a tasking to ‘prevent all *possible future* threats against friendly forces’ and a tasking to ‘eliminate the hostile force’s ability to stage offensive field operations.’ Calling the offensive use of force ‘self-defense’ does not make it so; it is merely an act of semantic alchemy.¹²³ Unfortunately, this verbal sleight-of-hand would have serious consequences for the ‘new’ peacekeeping operations of the 1990s.

Subsequent United Nations operations adopted provisions on the use of force nearly identical to those explicitly stated in the UNEF and ONUC force regulations. In

¹²² *Id.* at 50.

¹²³ Such an expansive use of the term self-defense introduces an ambiguity that can deceive troop-contributing governments and force commanders as to the force’s mandate, resulting in forces

his 1964 note and aide-memoire on the composition and function of the United Nations Force in Cyprus (UNFICYP), Secretary-General U Thant stated, “[T]roops may be authorized to use force... [against] attempts by force to prevent them from carrying out their responsibilities,” “attempts by force to compel them to withdraw from position,” or “attempts by force to disarm them.”¹²⁴ These UNFICYP guidelines appear more restrictive than ONUC’s, but Cyprus was a conflict with powerful states more or less controlling both factions. Nevertheless, the force regulation for UNFICYP reiterated verbatim Articles 43 of the ONUC regulation, itself a duplicate of Article 44 of the UNEF force regulation.¹²⁵

When UNEF II was established in 1973, its terms of reference specifically incorporated an ‘active tasks’ definition of self-defense, stating that the force would be provided with “...weapons of a defensive character only. It shall not use force except in self-defence. *Self-defence would include resistance to attempts by forceful means to prevent it from discharging its duties under the mandate of the Security Council.*”¹²⁶ This provision appeared again in the 1978 terms of reference for the United Nations Force in Lebanon (UNIFIL).¹²⁷

After this substantial dilution of the term ‘self-defense,’ what prevented United Nations operations from sliding higgledy-piggledy into wider violence? The answer is

undermanned and under equipped for offensive field operations. This may have contributed to the general impotence of UNPROFOR in Bosnia.

¹²⁴ Note by the Secretary-General Concerning Certain Aspects of the Function and Operation of the United Nations Peace-keeping Force in Cyprus, U.N. Doc. S/5653 (1964) at ¶18(a-c).

¹²⁵ Exchange of letters constituting an agreement between the United Nations and Canada concerning service with UNFICYP of the national contingent provided by the Government of Canada, 555 U.N.T.S. 120 (1966), ¶40.

¹²⁶ Quoted in *Report of the Secretary-General on the implementation of UNSCR 340*, UN Doc. S/11052/Rev 1 (27 Oct 73)(citing to UNEF II’s terms of reference, ¶4(d)).

¹²⁷ *Terms of reference for the United Nations Force in Lebanon*, UN Doc. S/12611 (19 Mar 78), ¶4(d).

twofold. First, 'self-defense,' like 'consent' and 'impartial,' is a value-laden word that connotes something other than bare offensive application of military force. In the three decades bounded by the brinkmanship of the Cold War and the neo-imperialist rhetoric of the Nonaligned Movement, words mattered a great deal. The Secretary-General and interested members were able to sell even limited efforts at peacekeeping to a reluctant and fractious Security Council only by careful packaging in the blandest available wrapper.

Second and more importantly, although the expansive definition of self-defense adopted by the Security Council did not place any effective parameters on the use of force by United Nations forces, the built-in limitations of each individual force erected intense prudential boundaries. Perennially starved for men and materiel, unable to sustain operations with anything above national battalion-sized units, and often presented with an unreasonably expansive mandate and nettlesome national restrictions, United Nations forces endured not doctrinal or legal limitations on the use of force, but rather the abiding constraints of prudence and discretion. As late as UNPROFOR's operations in Bosnia-Herzegovina from 1993-1995, the perceived ineffectiveness of the United Nations force was due to "...limited capability, not restrictive rules of engagement."¹²⁸ However, when the United Nations and NATO were finally able to field sizeable, well-armed, and well-supported forces in Bosnia in the air beginning in 1993 and on the ground beginning in late 1995, the ambiguity of self-defense became a dangerous matter.

¹²⁸ Pirnie and Simons, *Operational Issues*, *supra* note 46, at 58-59.

The Corollary of Self-Defense: Civilian Collateral Damage

That many UN forces operate in close proximity to civilians further complicates the question of the use of force. Even if agreement can be reached that UN troops can use force in particular circumstances, the effects of any use of force can potentially kill or do harm to civilians and their property—the dilemma known by the rather de-humanizing term “civilian collateral damage.” The customary international law rule, subsequently included in some treaty provisions,¹²⁹ asserts that collateral damage itself is not prohibited, only collateral damage which is *out of proportion to the expected military benefit* to be gained from use of force in a given situation. Geneva Protocol I prohibits “indiscriminate attacks” and defines as indiscriminate any attack which would cause “incidental loss” to civilians “excessive in relation to [the] concrete and direct military advantage anticipated.”¹³⁰ Combatants may only attack targets that make an “effective contribution” to a “definite military advantage.”¹³¹ Protocol I also places specific obligations on military planners and commanders, charging them to do “everything feasible” to verify valid military targets, to select weapons that will minimize civilian losses, to refrain from launching an attack if excessive civilian losses are though likely, and to cancel or suspend any attack if it becomes apparent the target is not of military importance or if excessive civilian losses are occurring.¹³² Finally, Protocol I expands the list of “grave breaches” subject to criminal sanction to include making civilians the

¹²⁹ See, e.g., articles 50, 52, 57, and 85, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), in *Documents, supra* note 48, at 416-17. See also, article 4, Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), *id.* at 342.

¹³⁰ *Id.* at art. 50(5)(b). The Hague Cultural Property Convention asserts an even higher standard, allowing attacks that might damage property protected by the Convention “only in cases where military necessity imperatively requires” such an attack. *Documents, supra* note 48, at 342.

¹³¹ *Id.* at art. 52(2).

¹³² *Id.* at art. 57.

direct object of attack or launching an indiscriminate attack with knowledge that excessive civilian losses will result.¹³³ This rule of proportionality attempts to strike a balance between practical acknowledgement that war is a very dangerous business and the humanitarian impulses to limit the suffering of civilians during armed conflict.

Such are the rules that apply to all international armed conflict—so much more so to peace operations. In a classical peacekeeping environment, civilian collateral damage should be minimal if force is truly used only in self-defense.¹³⁴ But even in less consensual (and therefore more dangerous) or even overtly nonconsensual enforcement operations, civilian collateral damage remains a difficult problem.

In peace enforcement it is more important than usual to avoid inflicting civilian casualties and destroying the national infrastructure. In a peace enforcement operation, the subsequent peace has to be kept in mind. It may even be necessary to ensure preservation of elements of the armed forces of the party being enforced, so as not to give rise to a destabilizing imbalance.¹³⁵

Compared to constraints placed on UN forces by their lack of armament or combat support, collateral damage represents the other side of the use of force equation. Whereas prudence may dictate that a lightly armed and widely dispersed force avoid expansive use of force, civilian collateral damage exerts an equally compelling *political* constraint on a force capable of undertaking offensive or significant defensive operations. It is unlikely the Security Council or the governments of most troop contributing nations would countenance large scale civilian death or injury except in expansive Chapter VII

¹³³ *Id.* at art. 85.

¹³⁴ In discussing his inability to put down violent demonstrations in the Gaza Strip, the force commander of UNEF, General Burns, explained the effect of restrictive use of force rules of engagement. "If these troops had been of an army of occupation, and severe measures of repression could have been used, no doubt overt disturbances could have been stopped quickly." Goldmann, *supra* note 37, at 19.

¹³⁵ Bellamy, *supra* note 43, at 176.

operations like Korea or the Persian Gulf that indisputably fall within the realm of international armed conflict.

As an example of the significance of political constraints on day-to-day operations, during the planning and execution of Operation DELIBERATE FORCE in Bosnia during August and September of 1995, the NATO air commander, Lieutenant General Mike Ryan, instructed his staff that the two measures of success for the operation were getting the Bosnian Serbs to the bargaining table and zero collateral damage. Coercing the Bosnian Serbs was clearly a political objective. The goal of zero collateral damage was a bit of hyperbole; in reality the aspiration was absolutely minimum civilian casualties and property damage. This was a self-imposed standard markedly more restrictive than the proportionality rule imposed by international law, but was based on a recognition that the entire Bosnian operation was politically quite tenuous. We simply could not afford to damage anything not on our limited list of military targets. The successful conclusion of the Dayton Accords in November 1995 and the complete lack of reported civilian deaths during the air campaign—and surely the Bosnian Serb authorities had an interest in publicizing any civilian injuries and exploiting the “CNN factor”—demonstrated that both measures of success were apparently satisfied.

Real Time Self-Defense: The Example of Airmen in Bosnia

The issue of just where the boundaries of self-defense lie is far from academic. For military commanders at all levels of responsibility, recognizing when to use force in self-defense is a critical skill that must be inculcated to the point of second nature. This issue is relatively easy only in one situation: when engaged in general warfare against an

enemy declared hostile by an appropriately high level of command authority. The Persian Gulf War is a good example. Once an opponent is declared hostile by appropriate national and/or international authority, his forces may be engaged and destroyed wherever and whenever found,¹³⁶ subject only to the constraints of the international law of armed conflict and any additional self-imposed constraints in the form of rules of engagement. Again, this is quite an easy matter when everyone knows it's an international armed conflict—even if states forego the formal declarations of hostilities. Nobody argues about it—everyone just knows it when they see it.

The post-Cold War world is generally not such an easy place; the Gulf War was an aberration and with luck one not likely to be repeated any time soon. Short of general warfare with a declared hostile enemy, commanders and their staffs must operate in the much more tentative universe of “operations other than war” or “peace operations” or one of a dozen other catchphrases. All such operations start, however, from a common core: the use of force in self-defense is the maximum use of force allowed without additional legal authority. Self-defense is a right to use force which all armies, big and small, enjoy on a daily basis. Indeed, all *people* carry the same right—the affirmative defense of self-defense is recognized in nearly every legal system past and present. Beyond self-defense, however, no one can go without some other independently justifiable legal basis. In the types of operations with which we are concerned, the United Nations, specifically the Security Council or (more dubiously) the General Assembly, is the sole source of any additional authorization to use force.

¹³⁶ See, e.g., CJCSI 3121.01, Standing Rules of Engagement for U.S. Force, ¶6 (unclassified).

When the Security Council invited Member States acting individually or in regional organizations to establish and enforce a no-fly zone over the territory of Bosnia-Herzegovina in 1993, NATO took up the offer and established a multinational air force under existing NATO command and control.¹³⁷

In June of 1993 and in the face of continued intransigence by the warring factions in Bosnia, the United Nations Security Council authorized NATO aircraft, already enforcing the no-fly zone under an independent mandate, to engage in air-to-ground operations within Bosnia to support UNPROFOR in the accomplishment of its mandated mission. The UNPROFOR mission included three parts: self-protection, ensuring the uninterrupted flow of humanitarian aid, and protecting the United Nations designated enclaves of Sarajevo, Tuzla, Bihac, Zepa, Srbenica, and Gorazde.¹³⁸ As a result of this significant extension of the air mission, by the spring of 1994 NATO controlled over 150 land- and sea-based aircraft from six countries spread from Greece to France and throughout Italy from the Alps to Sicily as well as afloat in the Adriatic.

The authorization for the use of force in Bosnia, was a complicated and convoluted business that can be addressed in three distinct (and often separate and antagonistic) parts. First, NATO air forces enforced the no-fly zone over Bosnia under an independent mandate contained in United Nations Security Council Resolution 816.

¹³⁷ The commander of this effort, Operation DENY FLIGHT, was the Italian three-star general commanding NATO's Fifth Allied Tactical Air Force (SATAF), headquartered at Aeroproto Dal Molin in Vicenza, Italy. The theater commander was the American four-star admiral commanding NATO's Allied Forces South, headquartered at Naples. When DENY FLIGHT began, the existing SATAF staff was not large enough to handle the operation, so a special Combined Air Operations Center (CAOC) was created at SATAF, directed by an American air force general. The CAOC operation grew rapidly in size and sophistication, reaching a population of over 500 personnel from nearly every NATO nation by the August 1995 and the commencement of Operation DELIBERATE FORCE against the Bosnian Serbs. The author served as legal advisor to the NATO CAOC from October 1994-February 1995 and again in August-September 1995.

This mandate existed separately and distinctly from the later operations of the United Nations Protection Force (UNPROFOR) in Bosnia. UNSCR 816 prohibited all air traffic in the airspace of Bosnia-Herzegovina and authorized the engagement of any aircraft found in that airspace operating without United Nations permission. Therefore, NATO air forces could engage aircraft violating the no-fly zone and were not limited by considerations of self-defense. In effect, legitimate international authority had declared hostile all unauthorized aircraft operating in Bosnian airspace—NATO forces were limited only by customary international law and whatever treaty law might apply.¹³⁹ After NATO air forces shot down four Bosnian Serb/Krajina Serb aircraft in one day, violation of the no-fly zone by offensive military aircraft effectively ceased and the no-fly zone became a fairly routine ‘air presence’ mission.

The second piece of the use of force puzzle in Bosnia came from UNSCR 836, extending the NATO air mandate to include air-to-ground support of UNPROFOR. However, the expanded mandate came with several qualifications. First, NATO could only attack ground targets to assist UNPROFOR in defending itself or in the accomplishment of its missions to protect aid deliveries and to defend declared enclaves. Second, and ultimately more troublesome, NATO could attack ground targets only at the request and with the consent of UNPROFOR *and* the Secretary-General or his representative—what was to become known as the ‘two-key system.’ The ‘two-key’ metaphor referred to the positive control system used in American nuclear missile silos,

¹³⁸ UNSCR 757, U.N. Doc. S/RES/757 (1992); UNSCR 761, U.N. Doc. S/RES/761 (1992); UNSCR 764, U.N. Doc. S/RES/764 (1992); UNSCR 770, U.N. Doc. S/RES/770 (1992); UNSCR 824, U.N. Doc. S/RES/824 (1993).

¹³⁹ As a matter of policy, NATO forces operated in compliance with the international law of armed conflict whenever it could be logically applied. Therefore, in order to minimize any civilian collateral damage, elaborate identification and warning procedures were required before any no-fly zone violator could be

wherein two officers, each with one key, must both turn them before missiles can be launched. Actually, in order to launch air attacks under the UNSCR 836 system, three keys had to be turned, two held by the United Nations (UNPROFOR and the Secretary-General's representative) and one by NATO. Although NATO and UNPROFOR were more often than not in agreement, it was this second United Nations key that proved to be the most difficult to turn.¹⁴⁰

NATO established an air-ground coordination cell in Sarajevo that was responsible for handling such requests. This cell was also responsible for certifying tactical air control parties (TACPs) assigned to each national battalion (with appropriate call signs like 'Windmill' for the Dutch and 'Matador' for the Spanish) and in scheduling training between NATO aircraft and the various TACPs. This system became quite efficient. This was a quite different mandate than the no-fly zone and required much more extensive coordination and communication procedures between NATO and the United Nations. In the context of the use of force however, additional constraints were placed on NATO air forces. First and foremost, there had to be a connection between a ground target and UNPROFOR's mission—this became an issue as the Bosnian Serbs began firing surface-to-air missiles at NATO aircraft, arguably not a threat to *UNPROFOR's mission*. There was no general authorization to plan or execute a systematic air campaign against any hostile ground targets. Second, each individual attack of a ground target had to be requested by UNPROFOR and approved by the Secretary-General's representative. Although the mechanics of UNPROFOR requests

engaged. In effect, this meant that NATO did not shoot down military helicopters—which were routinely disguised as civilian or medical—because of the difficulty in positively identifying them.

¹⁴⁰ Before the beginning of Operation DELIBERATE FORCE air campaign in August 1995, the Secretary-General gave his key to the United Nations force commander, British Lieutenant General Rupert Smith,

became fairly efficient,¹⁴¹ approval by the Secretary-General's representative was always a difficult matter.¹⁴²

Finally, both NATO and UNPROFOR forces carried an inherent right to individual, unit, and friendly force self-defense¹⁴³—and this leads us back to the point where the United Nations's rather fast-and-loose definition of 'self-defense' resulted in some potentially very dangerous consequences. Some real-world examples may be instructive.

Practical Problems with Use of Force Rules in Bosnia

Case One: Search and Rescue

In December 1994, two officers from the U.S. Marine Amphibious Ready Group/Marine Expeditionary Unit (MARG/MEU—pronounced 'mahrg-mew') embarked in the Adriatic to support air operation in Bosnia requested guidance on the use of force should there units be called upon to perform recovery of downed aircrew members in Bosnia under hostile conditions. The rules of engagement for NATO forces were essentially silent on this matter, vaguely stating that search and rescue was authorized anywhere in the area of operations. They said nothing about the use of force in *ground* operations because NATO was only routinely providing *air* forces.

finally establishing a true two-key system. See, Letter Datd 26 July 1995 from the Secretary-General to the Security Council, U.N. Doc. S/1995/623.

¹⁴¹ NATO established an air-ground coordination cell in Sarajevo that was responsible for handling such requests. This cell was also responsible for certifying tactical air control parties (TACPs) assigned to each national battalion (with appropriate call signs like 'Windmill' for the Dutch and 'Matador' for the Spanish) and in scheduling training between NATO aircraft and the various TACPs. This system became quite efficient.

¹⁴² The first such request made by UNPROFOR in 1994 took hours to coordinate. By the time coordination was completed, any possibility of the targeted hostile forces still being in place was gone. By early 1995, this coordination time had been cut to around 30 minutes, still a very long time for a ground unit under fire, particularly considering the less than 15 minute flight time from NATO bases in Italy to targets in Bosnia.

The MARG/MEU was a unit peculiarly well-suited to performing rescue missions in an uncertain or hostile environment—they continually trained for TRAP operations¹⁴⁴ and developed fairly sophisticated tactical doctrine for these missions. However, TRAP missions generally call for the helicopter insertion of a fairly robust (company sized) ground force to cordon off the area around a downed airman, accompanied by aggressive air coverage from attack helicopters and ground attack fighters. The idea is to stop any hostile forces before they get near the rescue area, with the emphasis on preemptive self-defense. The whole concept is designed around speed and the quick, intense use of force against any potential threat to the operation.

NATO's mandate for enforcing the no-fly zone did not extend to ground operations, although one could reasonably foresee the possible need for search-and-rescue in this type of air mission. But this was a marginal issue, as demonstrated by the lack of any guidance in the DENY FLIGHT rules of engagement.¹⁴⁵ Rescuing downed NATO airmen was clearly not supporting UNPROFOR, although again one could reasonably foresee losing aircraft during air-to-ground or air-to-air operations. We certainly hoped that UNPROFOR would be the first to pick up downed airmen, but UNPROFOR was often stuck in garrison and had nothing like general freedom of movement, particularly in Bosnian Serb controlled areas. We were therefore left to puzzle out the search-and-rescue problem based on general self-defense rules. But what did these rules tell us? If we adopted the United Nations's hitherto extremely broad version of self-defense, then any amount of force was allowed because we would be

¹⁴³ This is the standard coverage of self-defense as followed by U.S. forces. See CJCSI 3121.01, Standing Rules of Engagement for U.S. Forces, ¶2(a) and 5(a) (unclassified Enclosure A).

¹⁴⁴ For 'tactical recovery of aircraft and personnel.'

performing duties directly incident to the specified “active tasks” of either policing the no-fly zone or assisting UNPROFOR in the completion of their mandate. This seemed a bit of a reach, since UNPROFOR took a restrictively prudent view of their authorization to use force—they were after all a lightly armed force of about 30,000 imbedded in a fractured nation with over 400,000 men from three warring factions under arms. The basic U.S. rule (and in slightly more or less restrictive forms, the basic NATO and allied rules) was that we could use force in self-defense in a proactive manner, but there had to be a clear manifestation of hostile intent before we could shoot. Additionally, in a country where it was very difficult to separate armed hostile forces from civilians, we had the omnipresent concern about civilian collateral damage.

In the end, we cobbled together some proposed rules of engagement that essentially elaborated in a rescue-specific environment the general rule authorizing the use of force in self-defense upon a showing of hostile intent. These were presented to the operations directorate at Allied Forces South in January 1994; they promptly rejected our proposals as not worth the trouble, given the unlikelihood we would have to do an opposed rescue because of the high probability that UNPROFOR would pick up any downed airmen. Although representing a pyrrhic victory, four months later Captain Scott O’Grady was shot down over Bosnian Serb territory and spent six days evading capture. He was ultimately rescued by a TRAP mission from the MARG/MEU in the Adriatic. I suspect our draft search and rescue rules of engagement were dusted off for that operation, suddenly becoming well worth the trouble.

¹⁴⁵ AFSOUTH Oplan 40101—DENY FLIGHT was the governing document for the operation. All NATO plans contain a standard Annex E, which includes the rules of engagement for the operation.

Case Two: The Great SAM War

By the fall of 1994, the Bosnian Serbs had abandoned most flight operations in Bosnian airspace, shifting instead to a policy of harassing NATO aircraft as much as possible with their fairly extensive inventory of Soviet-made surface-to-air missiles (SAMs). The newest models were at least 25 years old, but they still posed a significant threat to NATO aircraft. NATO commanders viewed the loss of anything more than a very few aircraft as a threat to our own Achilles' heel: public opinion in participating countries, particularly the United States. With knowledge that downing aircraft would be the surest way to undermine support for NATO participation in Bosnia, the Bosnian Serbs steadily increased the radar coverage of their SAMs until large swaths of Bosnian airspace were effectively closed to safe operations by NATO aircraft. Since the ability to over-fly Bosnia with impunity and apply force at will was NATO's trump card, the situation quickly became intolerable. NATO had the aircraft and munitions to destroy SAMs, but no one was sure what authority we had to use them.

The options were again bounded by what exactly the mandates said and whose definition of 'self-defense' one accepted. Starting with the easiest answer, if a NATO airplane was equipped with anti-radiation missiles (a normal method for neutralizing an active radar-guided missile threat) and a SAM either tracked the aircraft with its radar or locked-on in preparation for a missile launch—both clear manifestations of hostile intent or a hostile act—then the aircraft could shoot first. This would be a clear case of self-defense under any definition. However, aircraft capable of carrying anti-radiation missiles were (and still are) fairly scarce in the NATO inventory and keeping such aircraft in the air over Bosnia at all times was a logistical impossibility. Of course, SAM

sites can be attacked with any kind of munitions, including guided and unguided bombs, cluster bomb units, and on-board guns, but using larger or less precise munitions requiring closer delivery would expose NATO aircraft to much greater risks and the civilian population to increased potential collateral damage.

As for attacking SAM sites under the UNSCR 836 mandate, there were two problems. First, any connection with supporting UNPROFOR's mission was fairly attenuated—SAM suppression and jamming aircraft could always accompany strike missions done for UNPROFOR since these were few and far between. The real problem was day-to-day flight operations enforcing the no-fly zone. Second and more importantly, UNPROFOR's experience time and again was that every time NATO destroyed a ground target, UNPROFOR troops were taken hostage—this representing another trenchant example of self-imposed prudential constraints on the use of force. UNPROFOR was therefore understandably reluctant to see too much bombing by NATO aircraft. Had we accepted or even known at the time of the ONUC-inspired broad view of “active task” self-defense, the no-fly zone mandate of UNSCR 816 was probably a sufficient legal basis.

By November 1994, concerns about losing NATO aircraft to Bosnian Serb SAMs during routine no-fly zone enforcement had restricted day-to-day air operations to fairly narrow corridors of Bosnian airspace. Operations planners at the NATO air headquarters were becoming increasingly frustrated with the situation, and proposals for dealing with the SAM threat skated very near the edges of the self-defense rules. For example, one proposal that gained a lot of support would place aircraft with bombs or anti-radiation missiles either airborne with a refueling tanker over the Adriatic or on short-notice

ground alert in Italy. If any SAM locked onto a NATO aircraft, that aircraft would leave the threat area and notify the air headquarters. The airborne anti-SAM aircraft would then proceed to Bosnia and attack the SAM site—a process dubbed “retrospective strikes” by the American director of plans at the NATO air headquarters.

At some point during the planning process, I was asked to comment on this plan. I recommended against its implementation for several reasons, all stemming from the confused state of use of force rules in Bosnia. First, as self-defense we were right back to the restrictive-expansive interpretive dichotomy. Under an “active tasks” approach (although I was not aware of this at the time), we surely would have been justified in attacking any SAM site that threatened to interfere with our independent mandate to enforce the no-fly zone. Mitigating against this however were two general notions about use of force. Generally, use of force in self-defense is meant to be limited in intensity and duration to that amount necessary to end the threat to yourself or friendly forces.¹⁴⁶ In the system proposed by the CAOC planners, we would have faced a several hour time lag between the hostile act (shooting a missile or locking on to a NATO aircraft) and our retrospective self-defensive attack. The threat was now gone—unless the same site locked onto the attacking airplane—and had been gone for quite some time. This *temporal* aspect of self-defense weighed heavily in my recommendation; with that long a delay, it seemed less like self-defense and more like just picking a fight. The fact that one of the senior staff officers termed these “retrospective *strikes*” said a lot—it appeared we were really planning reprisal air strikes as a means of convincing the Bosnian Serbs to

¹⁴⁶ See CJCSI 3121.01, *supra* note 136, at ¶5(d)(2). Proportionality as an element of self-defense requires that, “The force used must be reasonable in intensity, duration, and magnitude, based on all the facts known to the commander at the time, to decisively counter the hostile act or hostile intent and to ensure the continued safety of U.S. forces.”

turn off their radars and put their missiles back in garrison. Reprisals fall outside even an expansive definition of self-defense¹⁴⁷ and require authorization from a very high level.

Second, I was very concerned with *proportionality*. These purportedly self-defensive attacks could be against SAM sites anywhere in Bosnian Serb territory—and the systems were moved regularly—sometimes with limited intelligence and often near inhabited areas. If we dropped a bomb short or had an anti-radiation missile lose guidance and ‘go dumb,’ we could have faced some very unpleasant civilian collateral damage. Because Bosnia was such a politically charged operation, our proportional weighing of civilian losses against military necessity always tipped in favor of foregoing attacks if there was any real chance of civilian injury, although this was a stricter standard than the law of armed conflict requires. This was the practical impact of the much-discussed “CNN factor” and represented not a legal but a political limit on our use of force.

Finally, UNPROFOR forces were widely dispersed and ripe for hostage-taking. Because of the emergent nature of SAM threats against aircraft, we would be unable to coordinate self-defensive attacks with UNPROFOR other than with cursory warnings. Also, at that stage of the conflict, neither the UNPROFOR commander nor the Secretary-General’s representative were inclined to give us *carte blanche* authorization to destroy SAMs. Again, prudence rather than the boundaries of international law dictated our rules of engagement.

The “retrospective strike” self-defense plan was scrapped. As an interim measure, we continued to operate in airspace within the lethal range of Bosnian Serb

¹⁴⁷ See generally, Levie, Howard S. 1 *The Code of International Armed Conflict* 113-17 (1984).

SAM sites, but only at specified times during periods of coverage by SAM suppression aircraft—what were dubbed “SEAD windows.”¹⁴⁸ This was certainly seen as a second-best response since through self-imposed constraints we no longer enjoyed unfettered access to all Bosnian airspace at all times, but it did keep NATO air presence routinely in the skies over Bosnian Serb territory. Additionally, it was very costly in terms of our limited electronic warfare assets as well as general wear and tear on the SEAD aircrews.

Case Three: Bombing Udbina

On 21 November 1994, NATO aircraft attacked the Krajina Serb airfield and adjacent air defense sites at Udbina in Croatia. The runway at Udbina was cut in four places by precision munitions, and several air defense sites were disabled using a variety of munitions. The attack was ordered as a result of repeated air attacks launched from Udbina against ground targets in Bihac, a United Nations safe area in northwest Bosnia. The flights from Udbina violated both the no-fly zone provisions of UNSCR 816 and the safe area provisions of UNSCR 824.

Planning for the attack had been underway for some time because the SAM sites located around Udbina had for several months been tracking and locking on to NATO aircraft operating across the border in Bosnian airspace. In mid-November, the Krajina Serbs, in support of beleaguered Bosnian Serb forces in the Bihac pocket, had launched several air strikes into Bihac, dropping cluster bombs, rockets, and napalm. Although generally amounting to little more than terror attacks, on 20 November an aircraft attempting to bomb a mortar factory in the town of Cazin hit a smokestack and crashed

¹⁴⁸ SEAD (pronounced “SEE-add” by the Navy and “SEED” by the Air Force) is an acronym for “suppression of enemy air defense.” It includes jamming, disabling, or destroying hostile air defense

into an apartment complex, killing the pilot (whom the United Nations then identified by name) and an unknown number of civilians.

Attacking Udbina presented another interesting legal issue. When we began planning the Udbina raid in early November, we had no authorization from the Security Council to attack anything in Croatia. NATO's no-fly zone mandate was explicitly limited to Bosnian airspace. UNPROFOR, at the time the Bosnian section of UNPF (the UN Protective Force, which also included UNCRO in Croatia and UNPREDEP in Macedonia), had a mandate similarly limited to the borders of Bosnia.

It could again have been argued through an expansive "active tasks" interpretation of self-defense that since the Krajina Serbs were launching air attacks (as well as artillery bombardments) against the safe area of Bihac from Croatia, UNPROFOR ought to be able to authorize NATO to bomb in Croatia under the guise of friendly force self-defense. But crossing a border and attacking within the territory of a state which was nominally neutral in the Bosnian conflict was a big step to take based only on an expansive and not customarily recognized notion of self-defense. Even after acknowledging that the area of Croatia where Udbina is situated was under the control of a faction hostile to the Croatian government, this was still a big step that needed some political acknowledgement at the highest levels. Indeed, some of the senior officers, most of them Vietnam veterans, noted that 'Croatia' sounds chillingly similar to 'Cambodia.'

I discussed this problem with the NATO air commander for the southern region, Lieutenant General Mike Ryan, in mid-November. General Ryan concurred that we had problem and pushed the issue up the NATO chain-of-command. In what must still be a

radars, missile systems, and communications networks in order to minimize the threat to friendly air forces.

speed record for Security Council action, we had authorization within a few days¹⁴⁹ to extend our air operations in support of UNPROFOR—not an extension of our independent no-fly zone mandate—into Croatia. UNSCR 958 was a very terse document that it essentially told us to extend UNSCR 836 provisions into Croatia. Therefore, we required some connection to the UNPROFOR mission and ‘two-key’ approval. The Udbina attack occurred shortly thereafter.

¹⁴⁹ UNSCR 958, U.N. Doc. S/RES/958 (1994).

Chapter Three: The Status of United Nations Forces under International Law

Beyond the murky issue of where the boundaries of self-defense lie, many new United Nations forces operate under expanded Chapter VII mandates that explicitly allow them to go beyond the traditionally restrictive boundaries of self-defense to accomplish their mandates. However, this growth in the size, scope, and intensity of United Nations operations from small scale operations like UNIFIL and UNFICYP, has revealed the thin fabric of international law haphazardly thrown over such operations. The higher level of danger and potential for armed confrontation in these new demands a more reasoned analysis.

The threshold question of just what international law applies is surprisingly difficult to answer and requires investigation of the recent history and current structure of the international law of war and international humanitarian law. However, we might begin with consideration of a decidedly murky issue, the international legal status of deployed United Nations personnel.

The Changing Post-Cold War International Legal Environment

The totality of international law governing both the initiation of hostilities by a state (*jus ad bellum*) as well as limitations on the use of violence during violent conflicts(*jus in bello*) comprises the law of war. The Preamble and Article 1 of the United Nations Charter have essentially rendered obsolete what was an elaborate structure of international law concerning *jus ad bellum*, and was already discussed in Chapter 1. The legal regime surrounding *jus in bello* (discussed in the peacekeeping context in Chapter 2) has grown steadily since before the First World War and states have

concluded a large number of treaties codifying international laws that regulate their behavior in times of war.¹⁵⁰

Two interrelated subcategories of treaties and some customary international law have emerged concerning both the treatment of victims of warfare and limitations on means and methods of warfare. The first of these subcategories, international humanitarian law, is closely associated with the four 1949 Geneva Conventions with their Protocols and is generally overseen by the International Committee of the Red Cross. The other subcategory consists of treaty law regarding prohibited weapons and methods of warfare, including for example conventions prohibiting biological weapons, chemical weapons, environmental modification, destruction of cultural property, and certain conventional weapons. Taken together, these two clusters of treaties and customary law¹⁵¹ form the corpus of the law of armed conflict. The law of armed conflict, however, developed consonant with traditional concepts of noninterference and tight state sovereignty. By their own terms, these treaties are generally limited in application to

¹⁵⁰ Before Henri Dunant initiated his movement to ameliorate the condition of the victims of warfare after his fateful visit to the battlefield at Solferino in 1859, international law of war was concerned primarily with the matter of *jus ad bellum*. Nevertheless, there was some appreciation for the need to regulate the use of as well as the resort to arms. Hugo Grotius, in his *The Law of War and Peace* published in 1625, stated, "Throughout the Christian world I observed a lack of restraint in relation to war such as even barbarous races would be ashamed of. I observed that men rush to arms for light causes, or no cause at all, and that when arms have once been taken up, there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes." Quoted in Draper, G.I.A.D., "The Development of International Humanitarian Law," in *International Dimensions of Humanitarian Law* 68 (Henry Dunant Institute, 1988). For a discussion of the historically complex interrelationship between *jus ad bellum* and *jus in bello*, see Gardam, Judith Gail, *Non-combatant Immunity as a Norm of International Humanitarian Law* 38-41 (1993).

¹⁵¹ Customary law was specifically included within the law of war in the preambles to two of the early Hague Conventions. A provision first proposed by the Russian delegate Frederic de Martens—known now as the "de Martens clause"—included within the law of war "[t]he principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." See, e.g., Hague Convention IV Respecting the Laws and Customs of War on Land (1907), preamble, in Roberts and Guelff, *supra* note, at 48. See also, Draper, at 71-72; Roberts and Guelff, *supra* note 48, at 44-45.

instances of armed conflict *between* states and apply only in very limited circumstances to conflicts *within* states.

A limited application of the law of armed conflict to internal conflicts emerged from the perceived excesses of the Second World War. The internal brutality of the German fascist government led to a general recognition that some requirements of basic humanity applied in all contexts of organized violence, internal or international. This nascent recognition was embodied in the “common Article 2” provisions of the Geneva Conventions of 1947.¹⁵² Subsequently, the Geneva Protocols of 1977 extended the coverage of international humanitarian law to include wars of national liberation, but with fairly stiff threshold requirements.¹⁵³ These represented positive legal restrictions on state behavior within their own borders.

The other major development after World War II was the recognition that even in the context of war between sovereign states, individuals remained responsible for complying with basic concepts of humanity. The Nuremberg and Tokyo tribunals set precedent, some of which has been subsequently codified in treaties, that individuals could and would be held accountable for egregiously inhumane acts such as the waging of aggressive war and genocide.

Other than these small steps, international law has lagged behind political developments in this area. Nonetheless, just as Father Hehir and Professor Hoffman propose a paradigm of “just intervention” derived by analogy from historic just war

¹⁵² Common Article 2 applies to all forms of armed conflict, not just “international armed conflict” and prohibits grave crimes against civilians, including grievous assault, murder, and arson.

¹⁵³ For example, for a rebel force to enjoy Geneva Convention status they must not only meet the Protocol I requirements of an “armed force”—operating as a regularly organized unit, openly bearing arms, wearing identifiable insignia, and subject to an effective chain-of-command—they must also, under Protocol II, be in control of a significant portion of the national territory. Protocol Additional to the Geneva Conventions

concepts, it may be possible to discern at least the broad outlines of an “international law of intervention” by analogy to and extension of existing international law. As a first step, we must recognize in what ways United Nations intervention is similar to and differs from war.

The Applicability of International Treaties to United Nations Forces

In one category of United Nations operations, the answer to whether the international laws of armed conflict apply is quite simple: if the United Nations is directly engaged in or has specifically sanctioned Member States to engage in sustained offensive field operations against a named hostile force, then the law of armed conflict applies without qualification. This has only occurred twice since 1945: in the Korean conflict and in the Persian Gulf war. In Korea, the Geneva Conventions had not yet entered into effect for most belligerents but were nevertheless applied by United Nations forces throughout the conflict. In the Persian Gulf, “...it was never doubted that the coalition forces were subject to the law of armed conflict, and coalition states on numerous occasions declared that they had scrupulously complied with those laws.”

Nevertheless, the large variety of United Nations operations are in a somewhat murkier position regarding the law of armed conflict. The ambiguity in the application of the law of armed conflict to United Nations operations is really an issue of status—status of the force, of the conflict, and ultimately of the United Nations itself.

of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), art. 43, in Roberts and Guelff, *supra* note 48, at 411.

The Status of the United Nations as an International Actor

As a threshold issue, does the United Nations—an entity with an ambiguous international personality—have the ability to subscribe to the treaties that compromise the bulk of the law of armed conflict? The United Nations is not a party to any of the Geneva or Hague Conventions, nor has the Security Council or Secretary-General categorically accepted application of all international humanitarian law to United Nations operations.

On the one hand, traditional arguments asserting the United Nations's inability to officially subscribe to the Geneva and Hague treaties hinge on the peculiar quasi-sovereign status of the organization. Although able to function in many ways as a sovereign member of the international community, the United Nations is not a state—and the Geneva and Hague treaties were clearly constructed with states in mind. The United Nations has no traditional legislative or judicial competence, therefore it would be unable to enforce compliance.¹⁵⁴ Finally, because the United Nations has no territorial sovereignty, it cannot fulfill some treaty obligations.¹⁵⁵ This peculiar personality was reinforced during negotiations on the United Nations Safety Convention by the delegate from the International Committee of the Red Cross, who stated that the United Nations “may not be considered a party to an international armed conflict,” although past ICRC statements and most national delegations disagreed with this position.¹⁵⁶

¹⁵⁴ For example, the United Nations would not be able to comply with the requirement to punish grave breaches. *See, e.g.,* Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), articles 49, 50, 129, and 146. It is not clear what impact the establishment of a permanent international criminal court might have on this issue.

¹⁵⁵ Hannikainen, Hanski, and Rosas, *supra* note 24, at 103.

¹⁵⁶ Lepper, Steven J., “The Legal Status of Military Personnel in United Nations Operations: One Delegate’s Analysis,” 18 *Hous. J. Int’l. L.* 359, 399 (1996).

On the other hand, the practice of the United Nations over the past forty years has cast substantial doubt on the durability of this non-sovereign view. After drafting was completed on the Cultural Property Convention in 1954, the United Nations was asked to apply the treaty to all United Nations operations.¹⁵⁷ The United Nations has tacitly accepted that some customary international laws of armed conflict have risen to the level of *jus cogens* and therefore apply to all armed forces, its own included.¹⁵⁸ In 1957, the *Institut de Droit International* found that United Nations forces are “belligerents” within the customary law of war and as such are subject to its provisions.¹⁵⁹ The UNEF force regulations of the same year enjoined members of the force to respect the “principles and spirit” of international humanitarian treaties.¹⁶⁰ Soon after taking office in 1961, Secretary-General U Thant stated in a letter to the International Committee of the Red Cross that United Nations forces would abide by international humanitarian law “as scrupulously as possible,”¹⁶¹ and identical language was inserted in the ONUC force regulations in 1963¹⁶² and the UNFICYP force regulations in 1965.¹⁶³ In 1971, the

¹⁵⁷ Roberts and Guelff, *supra* note 48, at 371-72.

¹⁵⁸ Hannikainen, Hanski, and Rosas, *supra* note 24, at 104.

¹⁵⁹ Bowett, *supra* note 38, at 499.

¹⁶⁰ Regulations for the United Nations Emergency Force, art. 44, 27 U.N.T.S. 168 (20 Feb 57). *But see, id.* at 501-503. Bowett asserts that the law of armed conflict did not apply in any way to UNEF since the Force had strictly limited military authority, were deployed with the consent of the Egyptians, and enjoyed special immunities under the status of forces agreement between the United Nations and Egypt. All these factors, according to Bowett, were inconsistent with traditional notions of belligerency and therefore did not trigger application of, for example, the Geneva Conventions. However, this concept of recognition of belligerency has fallen into disuse and, at least in the context of internal conflicts, has been preempted by Geneva Protocol II. *See* Roberts and Guelff, *supra* note 48, at 12.

¹⁶¹ Quoted in Roberts and Guelff, *supra* note 48, at 372.

¹⁶² Regulations for the United Nations Force in the Congo, art. 4, UN Doc. ST/SGB/ONUC/1 (15 Jul 63).

¹⁶³ Exchange of letters constituting an agreement between the United Nations and Canada concerning service with UNFICYP of the national contingent provided by the Government of Canada, 555 U.N.T.S. 120 (1966). Nations contributing forces to UNFICYP were told to “...ensure that the members of their contingents serving with the Force be fully acquainted with the obligations arising under [the four Geneva Conventions and the Cultural Property Convention].” *Id.* at ¶11. The force regulations for the United Nations forces in Western New Guinea was, however, silent on international humanitarian law, directing only that the force should “respect the laws and regulations in force in the territory.” General directive concerning the United Nations security force in West New Guinea (West Irian), 503 U.N.T.S. 32. ¶7(d).

Institut de Droit International passed a resolution at its annual meeting in Zagreb calling for the application of all "rules of a humanitarian nature" to United Nations peace operations.¹⁶⁴ Again at their 1975 annual meeting, the *Institut* called for application of the "rules of armed conflict," including the Geneva conventions, conventions on prohibited means of warfare, and rules regarding proportionality and civilian protection, to all hostilities in which United Nations forces were engaged.¹⁶⁵ Additionally, the *Institut* recommended that the United Nations designate a 'protecting power' for United Nations forces.¹⁶⁶ In 1978, both a memorandum from the United Nations Peacekeeping Office to all force commanders and a letter from the Secretary-General to the president of the International Committee of the Red Cross reiterated that United Nations forces will comply with the "principles and spirit of international humanitarian law."¹⁶⁷ During the same year, the Secretary-General directed all states participating in UNIFIL to train their national contingents in the "principles and spirit of international humanitarian law" as a prerequisite to performing peacekeeping duties.¹⁶⁸ More recently, the Conventional Weapons Convention includes specific provisions concerning United Nations forces.¹⁶⁹

¹⁶⁴ *Institut de Droit International*, 54 *Annuaire* (Zagreb) 449 (1971). The Institute had been asked in 1965 to examine the issue of application of the law of armed conflict to United Nations operations. Roberts and Guelff, *supra* note 48, at 371.

¹⁶⁵ *Institut de Droit International*, 56 *Annuaire* (Weisbaden) 541 (1975).

¹⁶⁶ *Id.* at art. 6. Article 5 of Geneva Protocol I provides, however, that the International Committee of the Red Cross serves as protecting power for any force that has failed to officially designate one. This provides an interesting example of an international non-governmental entity becoming something very much like a party to an international convention.

¹⁶⁷ Palwankar, Umesh, "Applicability of international humanitarian law to United Nations peace-keeping forces," *Int'l. Rev. of the Red Cross* (May-June 1993) 227, 232-33. The memorandum to the Secretary-General was a reaffirmation of a resolution adopted by the International Conference of the Red Cross in 1965 asserting that peacekeeping forces are protected by the Geneva conventions. Resolution XXV, 20th International Conference of the Red Cross (1965) *quoted in id.* at 230.

¹⁶⁸ *Id.*

¹⁶⁹ Convention on Prohibition or Restriction on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, *in* Roberts and Guelff, *supra* note 48. Article 9(2) states that denunciation is effective after one year, unless United Nations "peacekeeping, observation, or similar functions" are underway, in which case the denunciation will be effective at the

The 1993 Declaration on the Protection of War Victims stressed that “peacekeeping forces are bound to act in accordance with international humanitarian law.”¹⁷⁰

Over time, the United Nations has stated that the “principles and spirit” of international humanitarian law includes the four 1949 Geneva Conventions, the two Geneva Protocols, and the Cultural Property Convention.¹⁷¹ Additionally, the United Nations has implied that the 1899 and 1907 Hague Conventions, the 1925 Geneva Poison Gas Convention, and the Conventional Weapons Convention are also included within the “principles and spirit.”¹⁷² By fairly close analogy, the Chemical Weapons Convention and the Environmental Modification Convention¹⁷³ can safely be included as well. It is not entirely clear, however, what if any difference there is between accepting the obligations of a party to the various Geneva, Hague, and other conventions and abiding by such an expansive list of their “principles and spirit.”

More pragmatically, the issue of the United Nations status in regard to international humanitarian law matters less because nearly all nations that contribute troops to United Nations operations are members of the Geneva regime.

completion of the United Nations mission. Again in Protocol II on mines, article 8(1) contains special provisions for United Nations forces.

¹⁷⁰ *Final Declaration of the International Conference for the Protection of War Victims* ¶I.7 (1993).

¹⁷¹ The Cultural Property Convention has an explicitly broad sweep, applying by its own terms to declared war, armed conflict between parties even if one does not recognize a state of war, occupation, conflict with a non-party who agrees to be bound by the convention, and in conflicts “not of an international character” within the territory of a party. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), in Roberts and Guelff, *supra* note 48, at 347.

¹⁷² Hannikainen, Hanski, and Rosas, *supra* note 24, at 102.

¹⁷³ The Environmental Modification Convention extends its prohibitions to military and “any other hostile” use of the environment. United Nations Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1977), in Roberts and Guelff, *supra* note 48, at 379. During NATO Implementation Force operations at Tuzla Air Base in Bosnia in 1996, the US Air Force commander was concerned that use of an experimental machine to reduce fog around the approach end of the Tuzla runway might violate the terms of the Environmental Modification Convention. After consultation with 16th Air Force and Headquarters, US Air Forces Europe, it was decided that the fog machine did not constitute an explicitly military or hostile modification of the environment, since the field was open to all parties and was routinely used for humanitarian air operations. (Authors note.)

The application of the laws of war to United Nations forces may not depend exclusively on the position taken by the United Nations. National contingents remain bound, to the same extent and the same degree, by the laws of war which would apply if the same forces were engaged in international conflict for their own states; states retain responsibility for their contingents.¹⁷⁴

The International Committee of the Red Cross has officially concurred in this position, stating in a 1961 memorandum to the United Nations and all states party to the Geneva conventions that national contingents remain bound by their treaty commitments when participating in a United Nations operation.¹⁷⁵ The ICRC reaffirmed this position in a 1978 letter to the United Nations Secretary-General concerning UNIFIL operations in Lebanon.¹⁷⁶ However, these nations vary in the treaties to which they subscribe and in their reservations to specific treaty provisions.¹⁷⁷ The United States is an obvious example, having never ratified either Geneva Protocol. Additionally, uneven compliance and enforcement practices could significantly affect the efficacy of the international humanitarian treaties.

The official position of the International Committee of the Red Cross, the sponsoring agency and repository for the Geneva treaties and protocols, reflects the ambiguity of the status of the United Nations and its forces. The ICRC has proposed four principles regarding the application of international humanitarian law to United Nations operations. First, although recognizing that the United Nations (unlike a state) cannot be a party to the treaties, the “fundamental principles and customary rules” of international humanitarian law apply to all United Nations operations. Second, the United Nations

¹⁷⁴ Roberts and Guelff, *supra* note 48, at 372.

¹⁷⁵ Palwankar, *supra* note 167, at 230. *See also*, Amnesty International, *supra* note 31, at 32.

¹⁷⁶ *Id.*

¹⁷⁷ Roberts and Guelff, *supra* note 48, at 372..

(like a state) has an obligation to ensure all United Nations forces are trained in international humanitarian law. Third, because the United Nations (unlike a state) has no juridical authority, individual nations must punish breaches of international humanitarian law by members of their national contingents. Finally, the United Nations (like a state) should assist the ICRC in the accomplishment of their mandate.¹⁷⁸

The status of the United Nations is ambiguous, but not of Member States which contribute forces. Nearly all have acceded to the major international conventions. Assuming these nations' forces remain bound by their national governments' obligations, the coverage of the international law of armed conflict in United Nations operations is extensive but somewhat uneven—not all participating nations have signed all conventions without reservations. Exactly when the coverage of these treaties is triggered during United Nations operations is another matter.

The Status of the Conflict: International versus Internal

By their own terms, the majority of law of armed conflict treaties apply only in the context of “international armed conflicts.”¹⁷⁹ Although the ambiguous status of the United Nations as an international actor has some impact, the most significant issue affecting the application of the law of armed conflict to United Nations operations is the

¹⁷⁸ Palwankar, *supra* note 167, at 231.

¹⁷⁹ Article 2 common to all four Geneva conventions states that the conventions will apply to “all cases of declared war or of any armed conflict which may arise between two or more of the High Contracting Parties...” This is generally abbreviated as “international armed conflict.” See, e.g., Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (1949), Geneva Convention III Relative to the Treatment of Prisoners of War (1949), and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), all in Roberts and Guelff, *supra* note 48.

determination of when a particular hostile situation is *international*, *armed*, and a *conflict*.¹⁸⁰

As a preliminary matter for multinational forces, it may be difficult to identify exactly when an “armed conflict”—international or internal—exists. The Geneva conventions themselves are unhelpful; none contain a definition of armed conflict. In 1983, the United States State Department declared that “...armed conflict includes any situation in which there is hostile action between the armed forces of two parties, regardless of the duration, intensity, or scope of the fighting...”¹⁸¹ This is a very broad definition and would include even isolated instances of use of force in self-defense—even warning shots and other non-lethal means of self-defense. However, this does not seem to present a serious problem, since most commentators tacitly adopt the position that since the United Nations generally deploys armed military forces,¹⁸² any fighting would therefore constitute an “armed conflict.”

But rather than dwelling on the fairly uncontroversial terms *armed* and *conflict*,¹⁸³ the real nut of the issue is whether or not a given scenario is *international*. Taking a particularly bright-line approach, it has been argued that the mere presence of United

¹⁸⁰ For an interesting survey of the widely divergent definitions of “war” from Plato to modern Marxists, see Przetacznik, Frank, *supra* note 11, at 8-29.

¹⁸¹ Greenwood, Christopher, “Protection of Peacekeepers: The Legal Regime,” 7 Duke J. Comp. & Int’l. L. 184, 200-201 (1996).

¹⁸² Article 43 of Geneva Protocol I defines an “armed force” as “all organized armed forces, groups, or units which are under command responsibility... and subject to an internal disciplinary system” so that compliance with the law of armed conflict can be enforced. Geneva Protocol I, *supra* note ____, at art. 43. The original Geneva conventions also required that the force be carrying arms openly and have some fixed insignia or uniform. See, e.g., Geneva III on Prisoners of War, in Roberts and Guelff, *supra* note 48, at 219. These indices of an “armed force” are derived from similar provisions in the older Hague conventions. See, e.g., Hague Convention IV Respecting the Laws and Customs of War on Land (1907), art. 1., in Roberts and Guelff, *supra* note 48, at 48. Clearly then, United Nations forces, if nothing else, qualify as “armed forces.”

¹⁸³ Substitution of the term “armed conflict” for “war” in the 1949 Geneva conventions was deliberately intended to widen the scope of application to include “[a]ny difference arising between two states and

Nations forces makes *any* conflict international. During negotiations on the United Nations Safety Convention for example, several delegates argued that since a United Nations force is by definition international, any United Nations intervention in an otherwise internal conflict automatically internationalizes it. The contrary position, and that taken by the United States delegates, was that there was no automatic internationalization. Rather, whether or not a United Nations force ‘internationalizes’ an otherwise internal conflict depends upon the role of the United Nations forces. One author cites Somalia and Bosnia as examples of situations in which the presence of a United Nations force did not internationalize a conflict because the United Nations did not “fight on behalf or in support of factions.” It is difficult to see how this decides the matter. Does a multilateral force engaged in intermittent armed hostilities with *all* factions (as in Somalia) somehow keep the conflict internal? If that same force then allied itself with an one such “internal” faction, why should that then render the conflict international?¹⁸⁴

The issue of what constitutes an international conflict has not been a thorny issue only for United Nations forces. The International Committee of the Red Cross officially would not engage in relief efforts for victims of internal conflicts until 1921, and then only after national societies had reported internal relief programs undertaken at the end of the First world War, particularly in Hungary and the Soviet Union. The ICRC amended its statutes in 1928, extending its good offices to “war, civil war, and civil strife.”¹⁸⁵ The existing international humanitarian conventions and customary law were similarly limited

leading to the intervention of armed forces...” Pictet, Jean, ed. 1 *Commentary on the Geneva Conventions* 32 (1952).

¹⁸⁴ Lepper, *supra* note 156, at 400.

in application, and as a result of the enormous and widely reported civilian suffering during the Spanish Civil War, a general consensus emerged that the existing international humanitarian law needed modification.¹⁸⁶ A conference scheduled for 1940 was delayed by the onset of the Second World War, and atrocities against internal minorities during that conflict strengthened calls for revision.¹⁸⁷

The scope of application for each of the four Geneva conventions is contained in a common Article 2. This article stated that the provisions of the conventions would apply in cases of declared war or armed conflict between two parties, during total or partial occupations, and in conflicts between a party to the conventions and a non-party if the non party agrees to be bound by the provisions of the conventions. The original drafts proposed by the ICRC, however, contained a fourth subsection, extending obligatory application of the “principles of the present Convention[s]” to non-international armed conflicts, “especially cases of civil war, colonial conflicts, or wars of religion.”¹⁸⁸ This proposal was universally rejected by the national delegations¹⁸⁹ out of apprehension that such a provision would internationalize all internal or colonial conflicts.¹⁹⁰ As a compromise, a common Article 3 was added to each convention, extending minimum protections¹⁹¹ to “armed conflict not of an international character occurring in the

¹⁸⁵ Abi-Saab, Georges, *Non-international Armed Conflicts, in International Dimensions of Humanitarian Law* 217, 219 (Henry Dunant Institute, 1988).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Abi-Sabb, *supra* note 185, at 220.

¹⁸⁹ *Id.* See also, Pictet, *Commentary*, *supra* note 183, at 43.

¹⁹⁰ Wilson, Heather A., *International Law and the Use of Force by National Liberation Movements* 182 (1988).

¹⁹¹ Common Article 3 protects the sick, wounded, and *hors de combat* soldiers from inhumane treatment and requires that they be collected and cared for and prohibits murder, mutilation, torture, cruel treatment, hostage taking, humiliating and degrading treatment, or the dispensing of summary justice or executions of noncombatants. See, e.g., Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), art. 3, in Roberts and Guelff, *supra* note 48, at 49.

territory of one of the High Contracting Parties.”¹⁹² Although common Article 3 extended some “elementary considerations of humanity”¹⁹³ to the victims of internal conflict, the Geneva regime remained a body of law applicable only in international warfare. Indeed, ICRC President Jean Pictet held that international humanitarian law applied only in time of war, with international human rights law applying in all other circumstances. However, Pictet perceived the inevitable overlap of human rights law and humanitarian law.¹⁹⁴ Particularly since the 1977 Geneva Protocols, there has been an increasingly integrated approach between human rights law and international humanitarian law.¹⁹⁵

Soon after the four Geneva conventions were opened for signature, pressure began building to expand the reach of the treaties beyond traditional international warfare between states. Beginning almost immediately after the end of the Second World War, colonies of the European powers initiated or renewed anti-colonial struggles for self-determination. The resulting expansion of the number of new states somewhat undermined the existing heavily European consensus on international laws of war. Many new states viewed expansion of international humanitarian law to cover civil war, anti-colonial resistance, or wars of national self-determination as in their best interest. Finally, the development of codified international human rights law lent increasing weight to the idea that what a government does to its own citizens should rightfully be of interest to the international community.¹⁹⁶

¹⁹² *Id.*

¹⁹³ Gasser, *supra* note 68, at 224.

¹⁹⁴ Chadwick, Elizabeth, *Self-Determination, Terrorism, and the International Law of Armed Conflict* 76-77 (1996).

¹⁹⁵ *Id.*, at 67-68. International humanitarian law may even have begun to “lean too far towards humanitarianism, to the possible detriment of an army trying to win a war.” *Id.*

¹⁹⁶ Wilson, *supra* note 190, at 182-83.

As mentioned earlier, there has been a steady expansion of the types of conflicts covered by international humanitarian law, and by analogy all law of armed conflict, since the 1960s. In 1973, the United Nations General Assembly adopted Resolution 3103, categorically stating that those forces engaged in armed conflict against “colonial and alien domination and racist regimes” were considered lawful combatants under all Geneva conventions.¹⁹⁷ In 1977, Geneva Protocol I adopted identical language, extending coverage of the Geneva convention to armed conflicts “in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination...”¹⁹⁸ The most important belief underlying this expansion was that groups fighting wars of self-determination were a “separate entity... distinct from the government administering them” and that therefore any war fought under such circumstances was “an international war even if it is not an inter-state war.”¹⁹⁹ Some attempt was made to disconnect extension of the coverage of the Geneva convention with any *de jure* international legitimization of insurgent groups by stating in Article 4 that application of the conventions and protocols does not affect the legal status of the parties to a conflict nor of the territory in question.²⁰⁰

Because of the unique character of United Nations forces—they are under the command of an international body, not a sovereign state—some commentators have suggested such forces should be excluded from the restrictions (but presumably not the benefits) of the law of armed conflict. Some early commentators argued that since aggressive war is made illegal under international law as contained in the United Nations

¹⁹⁷ *Id.* at 151. The United States representative protested, “...to classify one kind of conflict as international because of motivation or to accord special treatment to a select class of victims of war because of their motivation is frankly the antithesis of international humanitarian law and totally unacceptable.” *Id.*

¹⁹⁸ Geneva Protocol I, art. 1(4), in Roberts and Guelff, *supra* note 48, at 391.

Charter, by analogy to the customary international law of reprisals, forces opposing illegal aggression should not be bound by the international law of armed conflict.²⁰¹

More recently, one commentator has recommended enactment of a third Geneva Protocol containing provisions criminalizing *any* attack upon a United Nations force at any time, including Kuwait- or Korea-style general warfare. This “unequal application” theory is purportedly made acceptable because, in the author’s opinion, United Nations forces do not deserve to be lawful targets under existing international law²⁰² since they exercise a police power under the authority of the Security Council and therefore have an international *duty* to use armed force.²⁰³ This view disregards the premise that existing international humanitarian law affords immunity to all lawful combatants acting under state orders and that introducing unequal legal treatment of combatant forces might well lead to less respect for international law—one “might as well be hung for a sheep as a lamb” after all.²⁰⁴ More fundamentally, the historical epitome of unequal application, medieval “just war” theory, hampered the development of international humanitarian law for centuries²⁰⁵ and reached its natural and horrific denouement in the inhuman slaughter of the Thirty Years’ War in central Europe when both the Catholic and Protestant armies believed the justness of their causes allowed the unequal application of basic notions of decency. Happily, this “unequal application” idea has been repeatedly rejected by the

¹⁹⁹ Wilson, *supra* note 190, at 181.

²⁰⁰ Geneva Protocol I, art. 4, in Roberts and Guelff, *supra* note 48, at 392.

²⁰¹ Bowett, *supra* note 38, at 493-95. Customary reprisal law stated that a violation of the law of war could be punished by another (proportional) violation of the law of war in reprisal.

²⁰² See, e.g., Geneva Protocol I, art. 37-38, in Roberts and Guelff, *supra* note 48, at 409-10. Geneva Protocol I seems to accord to United Nations forces a status somewhat akin to the Red Cross. Article 37 lists as an act of perfidy “the feigning of protected status by the use of signs, emblems or uniforms of the United Nations...” Article 38 prohibits the use of the United Nations emblem by anyone except United Nations personnel.

²⁰³ Sharp, Walter Gary, Sr., “Protecting the Avatars of International Peace and Security,” 7 Duke J. Comp. & Int’l. L. 93, 164 (1996).

²⁰⁴ Greenwood, *supra* note 181, at 204-205.

international community, beginning with Hugo Grotius in the 17th century²⁰⁶ right through to the Geneva Protocols.²⁰⁷ The modern consensus is clearly that

[d]iscriminatory application of the law of war is definitely to be avoided. If one side in a conflict has more humanitarian protection because it is the 'just' side, then the law of armed conflict will quickly degenerate to the medieval practice of the victor dispensing God's justice.²⁰⁸

Under both customary and treaty law, soldiers of a national force operating under regular command are considered lawful combatants who enjoy legal immunity for their (not otherwise prohibited) actions during war, as well as the protections of international humanitarian law.

Soldiers as Diplomats under the United Nations Privileges and Immunities Convention

A subsequent result of the ambiguous status of conflicts in which United Nations forces are involved is that the personal status of United Nations troops has become equally ambiguous. Since lawful combatant status flows only from participation in an international armed conflict, United Nations forces may arguably not *de jure* be subject to or protected by the treaty and customary law of armed conflict.

The United Nations has never attempted comprehensively to sort out these important issues of status. As early as D.W. Bowett's 1964 work, *United Nations Forces: A Legal Study*, the issue of the application of the law of armed conflict to United Nations forces was ambiguous.

²⁰⁵ Draper, *supra* note 150, at 67-68.

²⁰⁶ *Id.*

²⁰⁷ Greenwood, *supra* note 181, at 205.

The question of the application of the laws of war to operations by [UN] military forces... has arisen almost incidentally, in the operations in Korea and in the operations of UNEF and ONUC. It is a question which does not seem to have been exhaustively examined by the United Nations, and certainly never authoritatively answered in anything more than a general way. No doubt the inherent difficulties of the question have deterred the United Nations' organs from attempting to give an answer, and as yet circumstances have not compelled an answer.²⁰⁹

Little of more authority has been said since 1964, and the issue of the applicability of the laws of armed conflict has been exacerbated by the increasing scope and violence of many recent United Nations operations. The United Nations has attempted to address this lacuna in two ways: by extending application of an existing treaty and, more recently, by creating a second convention.

As one of the first acts of the newly-formed United Nations, the General Assembly approved and opened for signature in 1946 a convention on the Privileges and Immunities of the United Nations (hereinafter the Convention).²¹⁰ The purpose of the document was to extend traditional diplomatic status to United Nations personnel, a proposition not entirely obvious under customary international law since officers of the United Nations were not representatives of a sovereign national entity. That the Convention was intended to extend immunities and protections granted to diplomatic representatives by both comity and international agreement is clear from the text.²¹¹

²⁰⁸ Wilson, *supra* note 190, at 181.

²⁰⁹ *Id.* at 484.

²¹⁰ Convention on the Privileges and Immunities of the United Nations, Adopted by the General Assembly of the United Nations on 13 February 1946, U.N.T.S. 16 (Doc. 4, 1946-1947) (hereinafter UN Privileges and Immunities Convention).

²¹¹ The Convention specifically calls for equivalent treatment of United Nations property and officials to diplomatic premises and property in §9 (communications), §10 (codes, couriers, and diplomatic bags), §11 (immunity of representatives of Member States), §17 (privileges of United Nations officials), §19 (immunity of Secretary-General, his Assistant Secretaries-General, and their families), §22 (personal bags of 'experts on mission'), and §27 (high United Nations officials travelling on *laissez-passers*). In other

Equally clear from the text, the Convention was not originally intended to apply to military forces.²¹²

The Conventions offered another possibility for dealing with the status of United Nations forces. As soldiers serving outside their home country, they would be protected as lawful combatants by the Geneva Conventions if involved in armed conflict. In this was, United Nations forces would be both protected and restricted by the Geneva Conventions' provisions on the treatment of prisoners and the wounded. The Privilege and Immunities Convention offered an alternative status to that of lawful combatant, albeit one not previously recognized under international law. By bringing members of the force under the umbrella of the Convention, the soldiers would be granted status equivalent to diplomatic agents.

Although the Privileges and Immunities Convention was intended to serve as an analog to existing protections for diplomatic personnel, its reach was extended dramatically when the first United Nations peacekeeping force, the United Nations Expeditionary Force (UNEF), was brought within its compass. Designed to monitor the border between Egypt and Israel in the aftermath of the Suez crisis of 1956, UNEF was deployed in 1957 with the consent of the Egyptian government. However, as an untried experiment in international cooperation, the status of UNEF troops while on mission in Egypt was rather unclear. Since UNEF would only deploy after a cease-fire, the international armed conflict emanating from the Anglo-French-Israeli Suez operations had ended. The United Nations troops had not been a party to this conflict, and the

sections of the Convention that do not specifically refer to "diplomats" or "diplomatic couriers," the language obviously mimics existing diplomatic privileges, immunities, and procedures concerning such matters as mission property (§§2 and 3), tax exemption (§7), and waiver of immunity for good cause (§§14, 20, and 23).

consensual nature of their deployment on the Egyptian side of the border suggested that the Geneva treaties (and arguably all other law of war treaties or customary law of armed conflict) should not apply *de jure* to them. The United Nations understood that the status of the peacekeepers needed clarification.

In the force regulation issued in February 1957, the United Nations asserted that the commander and officers of UNEF would be subject to sections 19 and 27 of the Privileges and Immunities Convention,²¹³ but was silent concerning the status of enlisted members of the force. As these provisions of the Convention grant diplomatic immunity to United Nations officials,²¹⁴ the commander of the fielded UNEF forces and his officers were essentially afforded the same diplomatic status as military attaches assigned to an embassy staff.²¹⁵ The rank-and-file of the force were granted no particular status.²¹⁶ Further clouding the situation, the final paragraph of the UNEF Force Regulation stated that “[t]he Force shall observe the principles and spirit of the general international conventions applicable to the conduct of military personnel.”²¹⁷ An obvious reference to the Geneva Conventions, this provision implied the force still maintained at least some

²¹² There is no mention of military personnel, even as advisors to the Secretary-General or as attaches to United Nations missions or organizations, anywhere in the text of the Convention.

²¹³ Regulation for the United Nations Emergency Force at ¶19, 27 U.N.T.S. 168 (20 February 1957) (hereinafter UNEF Force Regulation).

²¹⁴ UN Privileges and Immunities Convention, *supra* note 210, at art. V, §19 (and by reference § 18). Article V (which includes §§17-21) of the Convention (entitled “Officials”) states that “[t]he Secretary-General will specify the categories of officials to which the provisions of this Article... shall apply. he shall submit these categories to the General Assembly. Thereafter these categories shall be communicated to the Governments of all Members. The names of the officials included in these categories shall from time to time be made known to the Governments of Members.” I can find no evidence of this having specifically been done for UNEF or any subsequent United Nations operations.

²¹⁵ Bowett, *supra* note 38, at 130.

²¹⁶ UNEF troops were not regarded as agents or officials of the United Nations because they “remained in their national service since their duties with UNEF did not entail that they were to be regarded as officials of the United Nations.” *Id.* at 129-30, 132.

²¹⁷ UNEF Force Regulation, *supra* note 213, at ¶44.

attributes of a traditional fielded military force, even if its officers were considered quasi-diplomats.

When the United Nations authorized the establishment of the United Nations Force in Cyprus (UNFICYP) in response to interethnic Greek-Turkish violence on that island in 1964, the Status of Forces Agreement (SOFA) between the United Nations and the officially recognized Greek Cypriot Government of Cyprus again adopted the expedient of granting military members of the force the privileges and immunities specified in the United Nations Privileges and Immunities Convention, but in a modified form. Unlike the UNEF force regulation, the UNFICYP SOFA nominally brought all members of the force within the scope of the Convention, asserting that “[t]he Force as a subsidiary organ of the United Nations, enjoys the status, privileges and immunities of the Organization in accordance with the Convention...”²¹⁸ Nevertheless, the SOFA then further restricts the status of officers, unlike UNEF Force Regulation, by restricting the protections of Article V of the Convention to the force commander, his headquarters staff, and other “senior officers” specifically designated by the force commander.²¹⁹ Regarding other members of the force, the SOFA curiously abandons the United Nations Privileges and Immunities Convention protections, promising that the “... United Nations will claim with respect to members of the force only those rights expressly provided in the present or supplemental agreements.”²²⁰ Those rights enumerated in the remainder of the SOFA are the standard fare of most similar status of forces instruments: freedom of

²¹⁸ UNFICYP Status of Forces Agreement at ¶23, 492 U.N.T.S. 58 (1964) (hereinafter UNFICYP SOFA).

²¹⁹ *Id.* at ¶25. Except for any officers on the headquarters staff, this would suggest in general military terminology that only officers in the ranks of colonel (“senior officers”) and above would be included, excluding “field grade officers” (majors and lieutenant colonels) and “company grade officers” (lieutenants and captains).

²²⁰ *Id.*

movement, tax-free status, home state criminal jurisdiction, and civil immunity for official (but not private) acts or omissions.

When the United Nations Forces and Observers (UNFO) in the Sinai were replaced by a multilateral non-UN observer force in 1982, the Multinational Force and Observers (MFO), a new agreement between Egypt and Israel concerning the status of the observers adopted a third variation of privileges and immunities for MFO personnel. In the Appendix to the Protocol, the parties agreed “[t]he MFO shall enjoy the status, privileges and immunities accorded in Article II” of the United Nations Privileges and Immunities Convention.²²¹ Article II applies only to the “Property, Funds, and Assets”²²² of the force, not the force personnel. Indeed, the Protocol is silent on the status of the force, with the exception of the force commander and deputy commander, who are granted diplomatic immunity.²²³

The Bosnian Experience: The Status of NATO Airmen

The issue of the status of United Nations force personnel emerged with a new wrinkle during operations in Bosnia. Although UNPROFOR presumably remained in the same muddled (but by now traditional) status evolved under UNEF and ONUC, the status of the members of their air force was unclear. NATO crew members operating over Bosnia were not under United Nations command. They wore no blue berets and were excluded from the protections of the United Nations Status of Forces Agreement. Nor were they considered by the United Nations or NATO as “belligerents” or “lawful

²²¹ Protocol between the Arab Republic of Egypt and the State of Israel (3 August 1982), U.K.T.S. 1982, no. 37 (hereinafter Egyptian-Israeli Protocol).

²²² UN Privileges and Immunities Convention, *supra* note 210, at art. II

²²³ Egyptian-Israeli Protocol, *supra* note 221, at ¶24.

combatants” as defined in the Geneva and Hague conventions. The issue then arose, if not any of the above, then what? Short of any existing internationally recognized status, NATO aircrews were merely heavily armed tourists.

Although NATO air operations were clearly undertaken by a military force and not members of the Secretariat for whom the treaty was originally intended,²²⁴ the United Nations Legal Advisor’s Office again stretched the bounds of the Privileges and Immunities Convention, bringing NATO aircrews under its protection. In fact, all NATO aircrews and logisticians supporting UNPROFOR and the United Nations Rapid Reaction Force in Bosnia and Croatia were regarded as “experts on mission” and granted the quasi-diplomatic status of the Privileges and Immunities Convention.²²⁵ This “expert” status was immediately perceived by all flying personnel as a fobbing-off by the United Nations and a fairly ludicrous idea. As an illustration, in December 1994 I briefed a squadron of British Jaguar pilots at Gioia di Colle, Italy, as part of the standard theater in-briefings given by a team from the NATO air headquarters to all newly arrived squadrons. This particular unit had already done several rotations to Gioia, and as I was briefing “expert on mission” status, one experienced pilot pulled a bundle wrapped with several rubber bands out of one of his flight suit cargo pockets. I noticed part of the bundle included a light blue beret. I asked him what he had in his hand, and he said it was the travel documents with which he always flew. He unwrapped the bundle and showed me a “gooley chit” (what Americans call a “blood chit”—a printed silk square with a national flag and information printed in English and the languages spoken in the area of

²²⁴ Bowett, *supra* note 38, at 433-34. By contrast, Professor Bowett recommends application of the “general law relevant to status of forces (friendly) [and] even forces in ‘belligerent’ occupation of friendly territory.”

²²⁵ Sharp, *supra* note 203, at 129.

operations identifying the holder as a downed airman and offering a reward for his safe return), an UNPROFOR identification card with his name and photograph, an Operation Provide Promise (the humanitarian airlift operation in Bosnia) identification card with his name, his British forces identification, his British driving license, and his private British passport. When asked where he got the UN beret, he replied, "Oh, the squadron buys them from the same company in New Zealand as the UN—we just don't have the UN badges, unless you can trade for one with the UNPROFOR lads." He then said he was just checking to see if he had an "expert on mission" card as well.

Generally, what aircrews were told about their status while on mission over Bosnia was a muddle. The issue most on the minds of NATO aviators, regardless of nationality, was what their status would be if shot down and captured by one of the warring factions—particularly the Bosnian Serbs. The official position briefed to the crews was that if shot down and captured, they should demand immediate release to the nearest United Nations forces. Although they were "experts on mission" according to the United Nations and therefore not subject to detention, if detained they should demand the protections afforded to prisoners of war under Geneva Convention III.²²⁶ Additionally, American aircrews were instructed that the Code of Conduct, a code developed after the Korean conflict to provide guidance for personnel held by the enemy, applied in Bosnia.²²⁷

²²⁶ There is some basis for this in Geneva Convention III, article 5—neutral powers are directed to apply by analogy the provisions of Geneva III if any combatant falls into their hands. Geneva Convention III, Relative to the Treatment of Prisoners of War (1949), art. 5, in Roberts and Guelff, *supra* note 48, at 191.

²²⁷ The U.S. Code of Conduct includes provisions instructing captured American troops to keep faith with each other, maintain a military chain-of-command in captivity, attempt escape whenever possible, withhold military information from captors to the greatest extent possible, and refuse special treatment. According to its first director, Swedish Lieutenant Colonel Christian Hårleman the new United Nations Peacekeeping Operations Training Unit has since 1995 been in the process of developing a Code of Conduct for United Nations peacekeepers. Findlay, *supra* note 45, at 44.

Given the position of the United Nations and international law of armed conflict on prisoners of war, this seemed the right policy. We were to apply the general principles and spirit of the Geneva conventions including, we assumed, Geneva Convention III on prisoners of war. Article 5 of Geneva Convention III offered some insight into situations of unclear status like ours, stating,

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [e.g., prisoner of war, retained or detained person], such person shall enjoy protection of the present Convention until such time as their status has been determined by a competent tribunal.²²⁸

But Geneva Convention III also asserts that after someone is captured in an armed conflict or after committing a “belligerent act,” he cannot “renounce in part or in entirety the rights secured to them by the present Convention.”²²⁹ The NATO policy of asserting “expert on mission” status and demanding immediate release seemed in conflict with this provision. Geneva Protocol I expanded the coverage further by stating that anyone who actually took part in hostilities—not just “lawful combatants” or those who commit “belligerent acts”—was presumed to be a prisoner of war if captured.²³⁰ Indeed, the

²²⁸ *Id.* at 219.

²²⁹ *Id.* at art. 7, at 220. Identical provisions are contained in each of the four Geneva conventions. See Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), art. 7, in Roberts and Guelff, *supra* note 48, at 173; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (1949), art. 7, in Roberts and Guelff, *supra* note 48, at 196. Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), art. 8, in Roberts and Guelff, *supra* note 48, at 276. But see, Geneva Convention IV, art. 4, ¶2: “National of a State which is not bound by the Convention [arguably, members of UN forces] are not protected by it. Nationals of a neutral [arguably, a UN force member’s own nation]... shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

²³⁰ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), arts. 44 and 45, in Roberts and Guelff, *supra* note 48, at 411-12.

Draft Hague Rules of Aerial Warfare²³¹ state, "Belligerents may hold as prisoners of war any members of the crew or any passengers whose service in a flight at the close of which he has been captured has been of special and active assistance to the enemy."²³² The Draft Rules also allow for attack and capture of otherwise neutral aircraft if engaged in "unneutral service."²³³ Further confusing the matter, each participating country's crews were flying with national markings on their aircraft, national insignia on their uniforms, and national identification documents—and it seemed a bit extreme to assert each participating NATO nation was involved in an armed conflict with the Bosnian Serbs or Muslims or Croats.²³⁴

This apparent contradiction was not lost on aircrew members. After a standard brief on "expert on mission" status, a U.S. Marine pilot asked me, "So if I'm shot down coming off a bombing raid in which I just killed a few dozen of his buddies, I'm supposed to tell the Bosnian Serb with the AK-47 trained on me that I'm *not* a combatant, I'm *not* involved in an international armed conflict, and he *has* to immediately release me to the nearest blue beret? How do they say, 'You've got to be shitting me!' in Serbo-Croat?"

With the exception of a unilateral program undertaken by the Dutch, no NATO aircrews carried United Nations identification stating they were "experts on mission."

²³¹ Although the Draft Hague Rules of Aerial Warfare never entered into effect, they are considered an authoritative source of customary international law regarding air operations. Opened for signature in 1923, it is rather shocking that no subsequent comprehensive attempt has been made to codify rules for aerial military operations.

²³² Draft Hague Rules of Aerial Warfare (1923), art. 36, in Roberts and Guelff, *supra* note 48, at 129-30.

²³³ *Id.* at art. 53.

²³⁴ See, e.g., Gardam, Judith G., "Legal Restraints on Security Council Military Enforcement Action," 17 Mich. J. Int'l. L. 285, 317 (1996). "It seems manifestly incorrect to argue that states supplying the [UN] forces are each in a state of armed conflict with the state(s) against whom the action is taken. If they are, what is the legal basis...?"

Most carried standard military identification in compliance with the Geneva Conventions. All crews wore national uniforms and insignia; the British and the Americans carried their own national "blood chits" or "gooley chits" identifying them in both English and Serbo-Croat as British or American aviators. The Turkish F-16 crews were easily identifiable from their identification and national insignia as Muslims. No one was at all happy with this state of affairs.

The underlying weakness in the "expert on mission" status became apparent when we officially asked the United Nations to issue United Nations "expert on mission" identification, United Nations insignia, and United Nations "blood chits" to all our crews, with the U.S. Air Force offering to undertake production and distribution in theater. The response from United Nations headquarters in New York was unenthusiastic, but approval was finally given to issue United Nations identification to all NATO aircrews operating in Bosnia, with the restriction that all identification would be issued from United Nations Headquarters in New York. With the rapid turnover of air force and naval air units in the theater of operations, retaining issuing authority in New York seriously limited the practical utility of allowing NATO aircrews to carry United Nations identification—many units would arrive, serve their tour of duty, and rotate out of theater before United Nations Headquarters could produce their documents. Regardless, the issue died a natural death after the establishment of the NATO Implementation Force in December 1995 and the subsequent withdrawal of United Nations forces from Bosnia.

Ready-Shoot-Aim: The United Nations Security Convention

The most recent attempt to resolve the conundrum of what law applies to United Nations force members is the 1994 Convention on the Safety of United Nations and Associated Personnel (hereinafter the Safety Convention), adopted by the United Nations General Assembly and opened for signature on 17 February 1995.²³⁵ The creation of this convention began in the autumn of 1993 when the New Zealand Mission²³⁶ to the United Nations, then serving as a non-permanent member of the Security Council, circulated a draft text of a proposed convention criminalizing any attacks upon United Nations forces. The New Zealand draft was constructed around the principles of universal criminal jurisdiction and the "prosecute or extradite" mechanism included in existing treaties concerning the protection of diplomats and the prevention of hijacking.²³⁷ At the same

²³⁵G.A. Res. 59, U.N. GAOR, 49th Sess., at U.N. Doc. A/RES/49/59 (1995) (hereinafter Safety Convention).

²³⁶The New Zealand government recognized that that violence against peacekeepers was a complicated issue, particularly in the context of Chapter VII operations where no status of forces agreement exists obligating a host nation to cooperate in protecting peacekeepers. The New Zealand government feared that if "confronted with a situation in which there is no legal system to detain, try, and punish offenders [who attack them], UN forces on the ground will need to resort to increasingly robust rules of engagement." Amnesty International, *supra* note 31, at 29-31.

²³⁷Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, art. 6-8, 28 U.S.T. 1975, 1980-81 (1973), Convention for the Suppression of Unlawful acts Against the Safety of Civil Aviation, art. 5-8, 24 U.S.T. 565, 570-71 (1971), Bloom, Evan T., "Protecting Peacekeepers: The Convention on the Safety of United Nations and Associated Personnel," 89 Am. J. Int'l. L. 621, 622-26 (1995). Mr. Bloom, an attorney with the State Department Legal Advisor's Office, was one of the U.S. delegates on the Ad Hoc Committee set up to negotiate a proposed United Nations convention on protecting peacekeepers. Bloom stated that the idea beyond the New Zealand proposal was to "follow the precedents set by some widely ratified conventions in the terrorism field." Mr. Bloom's comments are telling; military forces are not diplomats and many hostile forces are not terrorists but organized fielded forces. The falseness of this analogy may very well explain many of the misconceptions surrounding the issue of the law of armed conflict as applied to United Nations forces. Nevertheless, the "try-or-extradite" mechanism has a long history in the law of war. As early as Hague Convention V in 1907, Parties were required to provide in their national law penal sanctions for "grave breaches" and were required to either try offenders or extradite them. Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), *in* Roberts and Guelff, *supra* note 48, at 188. This provision was also included in the Geneva conventions in 1949. *See, e.g.*, Geneva Convention II for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (1949), art. 50-53, Geneva Convention III Relative to the Treatment of Prisoners of War (1949), art. 129-132, and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), art. 146-149, *all in* Roberts and Guelff, *supra* note 48. "Grave breaches" in the Hague

time, the Ukrainian Mission circulated another draft document with a similar purpose, but written in the format of a Status of Forces or Status of Mission agreement and detailing the rights and responsibilities of deployed United Nations forces, host states, and transit states.²³⁸

After the formation of an ad hoc committee to consider the New Zealand and Ukrainian drafts, delegates from all major troop providing nations and other interested states met in December to begin discussions. For the United States delegation, the framework of their negotiating position had already been established by a recent Clinton Administration statement on US participation in United Nations operations known as Presidential Decision Directive 25.²³⁹ PDD-25 was issued after the perceived debacle of operations in Somalia, undertaken in large part by US forces. In particular, the short detention of an American helicopter pilot, Chief Warrant Officer Michael Durant, by forces of Somalia war lord Mohamed Farah Aideed caused much discussion in Congress concerning the status of American forces deployed on United Nations business. This resulted in a joint declaration sponsored by Representative Olympia Snowe, calling for assertion of prisoner of war status under the fourth Geneva Convention for any detained

Conventions included willful killing of a protected person, torture, inhuman treatment, causing great suffering or serious injury, or causing extensive destruction or appropriation of property if done wantonly and unlawfully and without military necessity. Geneva Protocol I added five new "grave breaches" if done willfully: deportation of one's own people, deliberate delay in repatriating prisoners of war, apartheid or racial discrimination, attacking clearly historical monuments, and depriving protected persons of a fair trial. Geneva Protocol I, art. 85(4), *in id.*, at 438-39.

²³⁸ Bloom, *supra* note 237, at 622-26. The United Nations had used status of forces agreements in the past. In addition to an UNFICYP status of forces agreement, the United Nations had negotiated an agreement of sorts for UNEF with an exchange of letters with the Egyptian government. The United Nations concluded a formal status of forces agreement with the South African government for the UNTAG mission to Namibia in 1989. The United Nations drafted a Model Status of Forces Agreement in 1991 which is, according to the United Nations Legal Advisor's Office, a codification of "customary practices and principles." The Model Agreement was accepted by the Croatian government for UNPROFOR forces in that country in 1993. The Model Agreement, however, only applies to operations under direct United Nations control. Sharp, *supra* note 203, at 117-118.

American personnel.²⁴⁰ This did not go down well with the Department of Defense (DoD), which objected to the application of the Geneva prisoner of war rules as explicitly sanctioning the holding of American prisoners by a hostile group until the end of hostilities. By extending coverage of the United Nations Privileges and Immunities Convention to cover military personnel, any detention would be illegal. DoD, unlike the United Nations, realized immediately that extending the Privileges and Immunities Convention, essentially a diplomatic treaty,²⁴¹ to cover deployed and armed soldiers was quite a stretch.²⁴² However, DoD saw the negotiations on the United Nations Safety Convention as a way to regularize immunity for soldiers engaged in many if not most United Nations operations.

The draft convention proposed to the General Assembly in February 1995 was completed after only four months of review and negotiations—unheard of speed in United Nations reckoning—and was relatively brief. Although it represented a cobbling together of the criminalization approach of the New Zealand proposal and the rights and responsibilities format of the Ukrainian draft, the convention still consisted of only twenty-nine fairly short articles, some of which deal with the minutiae common to all Status of Forces Agreements: identification, transit, and respect for host nation laws. The real substance of the convention concerns the criminalization of acts of violence against United Nations personnel and the establishment of mechanisms for the enforcement of this newly established individual criminal liability. The heart of the treaty is Article 9,

²³⁹ *The Clinton Administration's Policy on Reforming Multilateral Peace Operations* (May 1994) (hereinafter PDD-25).

²⁴⁰ 139 Cong. Rec. E-2362-63 (daily ed. October 6, 1993) (motion of Representative Snowe).

²⁴¹ See, e.g., Information Paper from Legal Counsel's Office, Chairman of the Joint Chiefs of Staff, 2 June 1995, concerning the status of U.S. aircrews flying in support of UNPROFOR operations in Bosnia (on file with author).

²⁴² Lepper, *supra* note 156, at 367, 369 (fn. 37).

which details the crimes each State Party to the Convention must incorporate into their domestic criminal codes. These include murder, kidnapping, or other intentional attacks²⁴³ on the person of United Nations or associated personnel; attacks against United Nations premises or vehicles; and threats, attempts, and assistance to the commission of any such crime. Article 8 makes it a crime to detain any personnel protected by the Convention and applies the “principles and spirit of the Geneva Conventions [presumably the third] of 1949” to any detention pending release.²⁴⁴ The major portion of the remaining articles establishes requirements and obligations for enforcement, including jurisdiction, prevention, information sharing, prosecution, extradition, mutual legal assistance, and reporting.

From the beginning of negotiations however, it became apparent that the biggest sticking point would be the scope of coverage of the Convention. This devolved not surprisingly into two familiar subsidiary issues: *who* should be included in the protections and *what types* of operations should the Convention cover? Coming as no surprise considering the muddled state of international law on the issue of United Nations operations, there was no ready consensus among the delegates on either of these matters.

In the matter of whom the Convention would protect, the delegations split between two positions. Nations which routinely contribute troops to traditional peacekeeping operations proposed that only those forces under direct United Nations command and control should be covered by the Convention. The United States, in

²⁴³ The delegates generally concurred on interpretation of intentional acts. By analogy to the Montreal Convention on hijacking, the Security Convention requires actual knowledge of the protected status of the victims. Bloom, *supra* note 237, at 626-27.

²⁴⁴ The U.S. negotiators saw this article as the key answer to concerns raised in Congress regarding the fate of captured Americans in United Nations service and provisions of PDD-25. Article 8 was viewed as a way to unequivocally demand the immediate release of detained personnel and as a means to effectively

keeping with its policy reiterated in PDD-25²⁴⁵ not to place American troops under direct United Nations command, sought a wider application of the Convention.²⁴⁶ At the time of the negotiations leading to the Safety Convention, I was serving as the Legal Advisor to the NATO air headquarters for Operation DENY FLIGHT. I had during that time several telephone conversations with then-Lieutenant Colonel Steve Lepper, assistant legal advisor to the Chairman of the Joint Chiefs and one of the U.S. negotiators for the Safety Convention. We discussed at length the need to extend to our aircrews some official status other than the unsatisfactory “expert on mission” acknowledged by the Legal Advisor’s office at United Nations Headquarters in New York. That the U.S. intended NATO aircrews flying in Bosnia to fall within the ambit of the Convention is certain. However, the language of the final text does not obviously include such aircrews, particularly if engaged in sustained combat operations as NATO air forces were in Bosnia during August and September 1995.

The resulting compromise accepted a second related category of “associated personnel,” defined in Article 1(b) as:

- (i) Persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations; (ii) Persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency; (iii) Persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic energy Agency.

refute claims that detained personnel were subject to indefinite detention as prisoners of war. Bloom, *supra* note 237, at 629.

²⁴⁵ PDD-25, *supra* note 239, at 13.

²⁴⁶ *But see* Bloom, *supra* note 237, at 623-24.

The insistence of the U.S. delegation on expanding the scope of persons covered by the Convention to include those described in Article 1(b)(i) opened the door to demands from other delegations to expand further the coverage of the Convention.²⁴⁷ Subparagraphs (ii) and (iii) were the result. Although the U.S. delegation objected to this dilution, their position was untenable. However, coverage of personnel from NGOs was limited to those in some sort of contractual relationship with the United Nations.

The greatest barrier to agreement right through to the end of negotiations²⁴⁸ was the insistence of some delegations that the criminalization of attacks on peacekeepers be strictly limited to “classical” Chapter VI peacekeeping operations²⁴⁹ of the UNEF of UNFICYP variety. The delegations supporting limited application believed that the convention should only impose criminal sanctions for attacks on true *peacekeepers*, not *peace enforcers* of any kind. Although the delegates reached a compromise that did not include a limitation to consensual operations only, one member of the U.S. delegation warned that this “... remains a volatile issue likely to arise frequently in future... application of this treaty.”²⁵⁰

The final form of the relevant provisions, Articles 1 and 2 were admittedly a fudge and unfortunately undermined much of the potential for the treaty to clarify the

²⁴⁷ Lepper, *supra* note 156, at 386-88. Bloom, *supra* note 137, at 624.

²⁴⁸ See *id.* at 458. Colonel Lepper, in commenting on the ultimate compromise that broke the impasse on this issue, stated that “...protection prevailed over politics—but not by much...this issue will not go away.”

²⁴⁹ *Id.* at 393-93.

²⁵⁰ *Id.* at 393. Commentators are already having difficulty placing various kinds of ‘new’ peacekeepers under one or another of the three categories of ‘associated personnel.’ Christopher Greenwood gives as an example of Article 1(b)(i) ‘associated personnel’ NATO aircrews in Bosnia before NATO’s Implementation Force (which he sees as Article 1(b)(ii) ‘associated personnel’) replaced UNPROFOR on the ground. This may be correct if one defines the role of NATO aircraft under UNSCR 836 as supporting UNPROFOR in the accomplishment of its mission. However, those same aircraft, sometimes retasked mid-mission, could just as easily be categorized under their UNSCR 816 no-fly zone mandate as Article i(b)(i) ‘associated personnel.’ See Greenwood, *supra* note 181, at 197.

muddled status of United Nations forces. First, Article 1 defines “United Nations operations” as

... an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control: (i) Where the operation is for the purpose of maintaining international peace and security; or (ii) Where the Security Council or the General Assembly has declared for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation...

This expansive language was thoroughly circumscribed by Article 2, entitled “Scope of Application.”

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

As an acceptable compromise, the U.S. and British delegations jointly proposed the language of Article 2(2), describing it as a kind of two-way switch toggling between application of the Convention or the international law of armed conflict, but never both at the same time.²⁵¹ This two-way switching of legal status was adopted so that “... from a military perspective, the commander of a United Nations operation [can] understand clearly and completely the law applicable to the operation’s people and mission.”²⁵²

What then do these provisions, taken together, mean for the coverage of the Convention? The Article 1 definition of “United Nations operations” automatically covers all operations authorized by either the Security Council or the General Assembly

²⁵¹ Lepper, *supra* note 156, at 397-411.

²⁵² *Id.* at 406.

“including peacekeeping and peace enforcement operations.”²⁵³ We begin then with a presumption of blanket coverage, exactly what most delegations intended so as to leave no gaps in coverage between the Convention and the laws of armed conflict or international humanitarian law.²⁵⁴ Next, in accordance with the language of Article 2(2), if an operation is *not* a Chapter VII operation,²⁵⁵ which can only be authorized by the Security Council, then the Safety Convention applies. Any operation (like UNEF in 1956) authorized by the General Assembly under “Uniting for Peace” would, *a fortiori*, be covered by the Convention as well.

That leaves all Chapter VI “peacekeeping” operations falling within the coverage of the Convention. But what about Chapter VII operations, whatever called? Again keeping to the language of Article 2(2), if an operation is *not* an “enforcement action” it is covered by the Convention. This of course begs the issue of how one determines if a particular action is an enforcement action. The obvious bright line, whether or not the Security Council invokes Chapter VII, was rejected by the United States and most other delegations. Instead, one of the U.S. negotiators looked to whether or not the operation was undertaken with the consent of all parties and what degree of force is authorized by the Security Council—does the force have authority to use “all necessary force,” for example.²⁵⁶ Now the waters are becoming clouded again. Divining meaning from the mostly precatory words that constitute Security Council resolutions can be difficult, but short of adopting a bright line Chapter VII rule, this is what must be done. If one

²⁵³ Bloom, *supra* note 237, at 623.

²⁵⁴ Lepper, *supra* note 156, at 406-10.

²⁵⁵ Greenwood, *supra* note 181, at 194-202.

²⁵⁶ Bloom, *supra* note 237, at 625-26.

determines that a particular Chapter VII operation is *not* an enforcement action, then the Convention applies.

This 'toggle-switch' approach to the application of the Safety Convention or application of the law of armed conflict runs counter to a general tendency over the past fifty years to broaden the application of the law of armed conflict to embrace what were previously seen as purely internal conflicts.²⁵⁷ The Geneva Protocols are the most obvious evidence of this trend. But at the same time as the international community has steadily broadened the reach of the Geneva Conventions, the United Nations has promulgated an increasingly expansive view of the use of force in 'self-defense' by its troops.²⁵⁸ The Safety Convention exacerbated an already ambiguous situation. In essence, if a Chapter VI (or VII) 'peacekeeping' force can use fairly breathtaking amounts of military force in 'self-defense,' which may now include preemptive attack and overcoming obstacles to mission accomplishment, the Safety Convention may well undermine the fundamental premise that the protections of international humanitarian law should apply in all armed conflicts, regardless of rightfulness or wrongfulness.

One issue on which the delegations were nearly unanimously agreed was that there must be a clear separation between the Safety Convention's coverage and the reach of the international law of armed conflict. No one wanted to undermine the Geneva structure and the equality of application incorporated therein.²⁵⁹ The murkiness surrounding Chapter VII operations makes such clarity unlikely, for exactly the same reasons the threshold for application of the Geneva Conventions is murky. As much for political as factual reasons, it is very difficult to determine when a United Nations

²⁵⁷ Greenwood, *supra* note 181, at 198-200.

²⁵⁸ *Id.*

operation becomes an international armed conflict. During initial discussions on Article 2(2), some delegations argued that only United Nations or associated forces actively engaged should be excluded from the protection of the Safety Convention. Although the ambiguity of the language of Article 2 allowed consensus on the Convention, this issue remains unresolved. The U.S. delegation's view, however, was that once the switch is thrown, it affects the entire force, not just individual units. Commanders must be clear on the status of their forces, as this affects plans, equipment, deployment, and tactical employment. Distinguishing at any given moment between "Convention-covered" and "law-of-war-covered" units would be impossible. Most importantly, allowing the switch to be toggled back and forth depending on the tactical situation of various units could force company-grade commanders of small units to make unacceptably quick *ad hoc* decisions concerning the status of their troops.²⁶⁰ Nevertheless, differing national interpretations of the applicability of the Convention to specific units of a United Nations force could lead to significant problems in future operations.

Potentially the most pregnant provision of the Safety Convention comes near the end, between savings clauses and the dispute settlement procedures. Article 21 of the Convention states, "Nothing in this Convention shall be construed so as to derogate from the right to act in self-defense." Although the U.S. delegation initially viewed the language of this article as a needless reiteration of existing customary international law,²⁶¹ one U.S. delegate later stated that Article 21 is "... perhaps the most important

²⁵⁹ Bloom, *supra* note 237, at 625

²⁶⁰ Lepper, *supra* note 156, at 406-8.

²⁶¹ Bloom, *supra* note 237, at 630. The right to both individual and collective self-defense is probably the most fundamental tenet of international law and certainly rises to the level of *jus cogens*.

provision in this treaty... It's purpose here is to make clear that self-defense is a right superior to any rights, duties, or limitations imposed in this Convention."²⁶²

But things are not as simple as they often seem, and even the assertion of the universally recognized right to self-defense contained in Article 21 is subject to widely divergent interpretation. Some delegations saw Article 21 as a means to legitimize the use of force against a United Nations force acting under an illegal mandate or operating beyond its otherwise legitimate mandate.²⁶³ The "mission creep" of the United Nations Joint Task Force in Somalia provides a good example of a situation where United Nations forces may have acted beyond their mandate.

The Safety Convention is, as one delegate stated, surely "not a perfect document." Its entry into force is probably inevitable, although to date few states have ratified. It is also likely that most of the State Parties will consist of wealthy or troop-contributing states, not "the Somalias, Rwandas, and Bosnias" necessary for the treaty to have a significant impact on future operations.²⁶⁴ At a minimum—and sadly probably maximum—the Safety Convention may offer some incremental additional protection to those engaged in "classical" low-threat peace operations.

In addition to confusion surrounding application, significant problems are likely to arise in enforcement of the individual criminal liability imposed by the Safety Convention. If strictly interpreted, criminal liability could extend downward to include every private soldier who pulls a rifle trigger or drops a round down a mortar tube. It seems quite unlikely any national or international court would engage in such a wide jurisdictional sweep. That said, if criminal prosecutions would be practically limited to

²⁶² Lepper, *supra* note 156, at 452.

²⁶³ *Id.* at 455.

military²⁶⁵ and political leadership, it is not clear what the Safety Convention adds to existing national and international criminal law. Even assuming *arguendo* that some tribunal wished to punish every soldier who violated the Safety Convention, what is to be done with soldiers who were present at fighting against United Nations forces but did not actively and directly participate? Are they protected by common article 3 notions of due process? If the Safety Convention applies, then under the 'toggle switch' approach the Geneva Conventions do not, so no one is a lawful combatant. Does this mean all members of a hostile force are either criminals under the Safety Convention or protected persons under common article 3 of the Geneva Conventions to which United Nations forces claim to subscribe? And if an international criminal court takes jurisdiction over crimes committed under the Safety Convention, is it a violation of Geneva IV for troops of any State Party to transfer a protected person to a United Nations tribunal—since Geneva IV prohibits transfer of such persons to any "Power not a party to the Convention"—and the United Nations has asserted it cannot be a party to the Geneva Conventions?²⁶⁶

The Safety Convention is not the last word on the issue of status of United Nations forces. Unfortunately, with little sign of movement on this confused issue, subsequent United Nations operations seemed doomed to confront anew the same ambiguities.

²⁶⁴ *Id.*

²⁶⁵ Article 87 of Geneva Protocol I has codified the principle, first explicitly set forth during the Tokyo Tribunal's proceedings, that commanders are responsible for grave breaches of the law of armed conflict by their subordinates. *See generally, In re Yamashita*, 327 U.S. 1 (1945).

²⁶⁶ *See Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War* (1949), Article 45.

Chapter Four: Conclusions

Should the law of war be changed to accommodate new peacekeeping? Or can the existing international legal regime adequately cope with expanded United Nations operations? With this expansion over the past decade, a kind of zeal has overtaken much of the academic and legal community—a zeal not uniformly shared by the political community after the tough lessons of Rwanda, Bosnia, and Somalia—that anything may now be possible. With a new cooperative *modus vivendi* among the permanent members of the Security Council and widespread agreement on the unacceptability of inaction in the face large-scale human tragedy or systematic human rights abuses, the international community is willing to countenance multilateral operations on a grand scale. But this impetus to “just do something” should be resisted²⁶⁷—in the legal as well as the political-military sphere.

Existing international law can and should be applied, either directly, by analogy, or after conservative modification, to new-style United Nations operations. Abandonment of the law of armed conflict in these operations was and remains an ill-advised idea. Over the past three centuries, the law of armed conflict has evolved through consensus within the international community as an important mechanism for ameliorating the worst effects of war. States understand it, most have explicitly accepted it, and with varying degrees of vigor generally abided by it. Nullifying its application and utility because of the notion that the United Nations Charter has made the resort to war illegal is to miss the point: the law of armed conflict accepts as its starting point that

²⁶⁷ Professor Valerie Bunce of Cornell, writing in the context of Bosnia, points out that the rush to “do something” before the establishment of any preconditions for a successful peace were in place, may actually have prolonged the conflict. Bunce, Valerie, “The Elusive Peace in the Former Yugoslavia,” 28 Cornell Int’l. L.J. 709, 715-18 (1995).

the system has failed to keep the peace. It aims only to reduce the worst effects of war until such time as peace can be restored by political means.

United Nations Operations as 'Just Interventions'

Much comment has been made on the need to develop some parameters for determining where and when the United Nations should authorize forceful interventions. The realm of the possible has surely expanded—protecting relief shipments, ending tribal violence, protecting ethnic minorities, guaranteeing democratic government—but it is not infinite. The Clinton Administration's PDD-25 and Secretary-General Boutros-Ghali's *Agenda for Peace* were early attempts to set forth some explicit criteria; both have received criticism and have subsequently been amended, but such attempts at least advance the debate through the controversy they engender.

But the institution most responsible for shaping the future direction of United Nations operations has done little in this regard. Rather, the Security Council has reacted to crises as they emerge, and has thereby aggravated the ambiguity and uncertainty surrounding recent United Nations operations. The Security Council must develop a strategic vision; failure to do so will only encourage future problems, as recent violence against ethnic Albanians in Yugoslavia's Kosovo province might suggest. Until the permanent members of the Security Council recognize the need for clarity of purpose, future operations will continue to be viewed as haphazard or neo-imperialist or woefully ineffectual. As James Allan has said,

[T]he major difference between the new peacekeeping and the old will be that more peacekeepers will die to little purpose in the new versions... When increasing numbers of new peacekeepers begin to die... the member states will

demand that the UN codify, clarify, and legitimize the new phenomenon or abandon it.²⁶⁸

Because of the immediate or potential armed conflict inherent in any operation undertaken by armed military forces, the Security Council should immediately state that it considers all United Nations operations conducted under the authority of both Article VI and VII to be “international armed conflicts” for the purposes of international law. United Nations forces should immediately comply with all requirements and restrictions of the Geneva and Hague Conventions in an unambiguous manner. The United Nations Legal Advisor should immediately reject the application of the United Nations Privileges and Immunities Convention to military forces operating under a United Nations mandate and recognize that applying “expert on mission” status to peacekeepers is demeaning to soldiers and dilutes the bona fide privileges and immunities of United Nations personnel performing diplomatic duties.

Certainly, the uniform application of the Geneva Conventions to all operations will place additional burdens on United Nations forces. At the same time, unambiguously applying international law of armed conflict will provide clarity of obligations, simplicity of purpose, and uniformity of status and protection to United Nations forces.

The Use of Force in United Nations Operations

The confusing concepts concerning the use of force that evolved during classical peacekeeping operations is a legacy that must be overcome if future operations are to be planned and executed in an effective manner. The almost Orwellian character of “active

²⁶⁸ Allan, *supra* note 59, at 8.

task” self-defense must be abandoned—self-defense is not the same thing as offensive field operations, even if undertaken to fulfill a Security Council mandate. This torturing of an erstwhile well-understood legal and military concept has worked much mischief in recent operations. That the United Nations was forced into this tenuous construction by the political environment of the 1950s, 60s, and 70s—neither the U.S. nor the Soviet Union was interested in allowing offensive operations in a world divided between their respective spheres-of-influence—should be confronted openly and rejected in light of a radically changed international environment.

Soldiers know what the law of armed conflict proscribes and requires. The explicit application of the law of armed conflict to United Nations operations would impose no additional burden on participating forces. The technical issue of the legal ability of the United Nations to become a party to treaties is not dispositive. If the ICRC and the existing States Party to the Hague and Geneva conventions determine that the United Nations may not be a party, there are numerous ways the Security Council can formally bind United Nations forces. For example, Article 96 of Geneva Protocol I allows any “authority representing groups” fighting against colonial domination, apartheid regimes, or hostile occupations to unilaterally declare acceptance of the Geneva conventions and protocols, thereby making them “equally binding” on all parties to a conflict.²⁶⁹ Common Article 3 of the Geneva conventions authorizes and encourages the use of “special arrangements” between parties to extend the application of the conventions.²⁷⁰ Additionally, all Geneva conventions encourage similar “special

²⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol I), in Roberts and Guelff, *supra* note 48, at 443-44.

²⁷⁰ See, e.g., Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), *id.* at 172.

arrangements” between parties on matters outside the specific terms of the conventions.²⁷¹ Ultimately, the United Nations could simply state that all of its military operations will be governed by the law of armed conflict²⁷² and require all troop-contributing states to accept the provisions of relevant customary law and treaties for the duration of their participation in the operation.

The Status of United Nations Forces

The debate surrounding the status of forces participating in United Nations operations is a controversy needlessly perpetuated by the United Nations itself. Whenever a United Nations force uses or is likely to use force against any organized armed group, the United Nations troops are lawful combatants engaged in an international armed conflict. That the United Nations and some participating states have gone to great lengths to claim otherwise does not change this fact.

In the negotiations for the United Nations Safety Convention—a document thought necessary only because the United Nations has for what one can only imagine to be political reasons assiduously shunned lawful combatant status for its forces—the U.S. delegation resorted to bizarre arguments in their effort to keep recent operations out of the category of international armed conflict. They determined that Somalia was not an “international armed conflict” because it involved only Somalia clans and was therefore not “international.” This of course was legally contraindicated by the Security Council’s determination that Somalia was a conflict of an international character. More simply,

²⁷¹ See, e.g., *id.* at art. 6.

²⁷² One critic of the United Nations sponsored operations in the Persian Gulf believes that the “all necessary means” language in Chapter VII resolutions is the optimal place for the Security Council to state that under

that American and Pakistani soldiers were dying more than “internationalized” the Somalia operation. In contrast, the U.S. delegation declared Bosnia not an “international armed conflict” because although it was made “international” by the United Nations’ recognition of Bosnia and Croatia, it was not a “conflict” as far as UNPROFOR and NATO were concerned—they were not “parties” like the Serbs or Muslims. One must wonder, particularly after the large expenditure of munitions by NATO aircraft against Bosnia Serb targets during Operation DELIBERATE FORCE, what exactly a force must do to *ever* become a party to a conflict?

These contortions do no good, and in fact obscure the real issue of just when and where the United Nations *should* forcefully intervene. Also, this torturing of plain language ultimately leads to a profound sense of cynicism—especially among force members—concerning the Security Council and United Nations operations in general. During DENY FLIGHT no-fly zone operations in Bosnia, for example, there was a sense that we somehow had to avoid taking sides—“everyone’s our friend and everyone’s our enemy” was the catchphrase most heard—although each staff officer and aviator was well aware that nearly all violations of Security Council resolutions were perpetrated by the Bosnian Serbs. More importantly from an airman’s viewpoint, the Bosnian Serbs were the only faction shooting at or threatening our aircraft. This disconnection between the perceived “company line” of strict impartiality and the facts we saw unfold every day was a great drag on force morale and led to a general sense that no one was really serious about ending the conflict in Bosnia.

no circumstances should the use of force by United Nations forces violate customary or conventional law of armed conflict. Malekian, Farhad, *Condemning the Use of Force in the Gulf Crisis* 59 (1992).

The last decade has witnessed the opening of broad new possibilities for multilateral action undertaken by the Security Council through their plenary authority to confront threats to international peace and security. But the stalemate of the Cold War produced a distorted body of norms and interpretations of international law regarding United Nations operations. This is not a promising root upon which to develop coherent and comprehensive norms of intervention and behavior for the new peacekeepers. The sooner this is recognized, the sooner the military forces performing United Nations operations can act in a legally well-grounded and logically well-reasoned manner. Better by far to put old wine in new bottles than to throw away a fairly satisfying old vintage.